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No. 2181

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

THE OREGON AND CALIFORNIA RAILROAD .
COMPANY, a corporation,

Complainant and Appellant,

VS.

MARIA DE GRUBISSICH, nee MARIA DE PORT-
ALES,

Defendant and Appellee.

Upon Appeal from the United States District
Court for the District of Oregon.

TRANSCRIPT OF RECORD.
(In Three Volumes)

VOLUME III.
Pages ~~1069~~, to 1688 Inclusive

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Records of U.S. Circuit Court
of appeals

771

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THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant and Appellant,

vs.

MARIA DE GRUBISSICH, nee MARIA DE PORT-
ALES,

Defendant and Appellee.

**Names and Addresses of Attorneys
upon this Appeal:**

For the Appellant:

Wm. D. Fenton, K. L. Fenton, Ben C. Dey and A. P.
Dobson,

Fenton Bldg., Portland, Oregon

For the Appellee:

Henry Conlin,
H. W. Hogue,

Pacific Bldg., San Francisco, Cal.
Sherlock Bldg., Portland, Oregon

STATE OF OREGON

County of Multnomah—ss.

I, Ben Holladay, being duly sworn say I am one of the plfts herein that the foregoing replication is true as I verily believe. Ben Holladay.

Subscribed and sworn to before me this 9th day of April, A. D. 1870. Witness my hand & seal.

C. A. Dolph

Notary Public for Oregon.

(Endorsement on back.)

In the Circuit Court of the tSate
of Oregon for the County of Multnomah.
Ben Holladay and C. Temple Emmett,
Plaintiffs,

vs.

Simon G. Elliott et al.

Defendants

REPLICATION

Mitchell & Dolph.

Attys for plft.

Filed June 19, 1876,

D. H. Murphy, Clerk.

Filed April 11th, 1870.

B. S. Norden, Clerk.

By Jas. W. Davis, Deputy.

STATE OF OREGON,

County of Marion.

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that I have compared the foregoing and attached copy of Contract attached to

That Ben Holladay died on or about the 8th day of July, 1887, in the County of Multnomah and State of Oregon, and that at the time of his death he was an inhabitant of said County and State.

That said deceased left an estate in the County of Multnomah as well as in other counties of the State of Oregon, consisting of an interest in real and personal property, the value and character of which are as follows, **to-wit:**

The equity of redemption of all and singular the real and personal property in the possession and under the control of Geo. W. Weidler and Joseph Holladay, as receivers appointed by the Circuit Court of the State of Oregon for the County of Multnomah, in the suit of Ben Holladay vs. Joseph Holladay and in the possession of Geo. W. Weidler, as trustee, appointed by said Court, a more particular description of which real and personal property can be had by reference to the orders and decree of said Circuit Court in said suit.

That said real and personal property so in the possession of said receivers and trustee are subject to the lien and claims of creditors thereon, amounting in the aggregate to the sum of about \$700,000.00|100 and that the value of said property over and above said liens and claims thereon, is about the sum of \$500,000.00.

That the estate and effects for and in respect of which the probate of the will hereinafter mentioned and applied for does not exceed the sum of \$500,000.00.

That said deceased left a will bearing date the 27th day of September, 1875, in the possession of your petitioners, and which your petitioners believe, and therefore allege to be the last Will and Testament of said Ben Holladay, deceased, and which is herewith presented to this Honorable Court for probate.

That Joseph Holladay, Henry Hamton and S. L. M. Barlow are named in said will as executors thereof, without bonds or security; and Esther Holladay, widow of said deceased, aged years, residing at Portland, Oregon, Ben Holladay, Jr., who has since died and Marie de Pourtales, the grand daughter of said Ben Holladay, deceased, aged about 16 years, and now residing at Paris, France, are therein named as devisees.

That the subscribing witnesses to said will are, George K. Otis of 111 Taylor Street in the City of Brooklyn, in the State of New York, George F. Otis, of the same street, city and state, and S. D. Thomas, of 229 Sanford Street in said city and state, all of whom your petitioners are informed and believe now resides in said City of Brooklyn.

That the next of kin of said deceased, and whom your petitioners are advised and believe, and therefore allege to be the heirs at law of said deceased, and th names, ages and residences of said heirs are Esther Holladay, aged years, residing at Portland, Oregon; and Esther Holladay is the widow of said deceased, Linda, aged 10 years, and Benjamin aged 8 years, both of whom are the children of said deceas-

ed, and said Esther Holladay, and reside in Portland, Oregon, and Marie de Pourtales the grand daughter of said deceased, and who is the daughter of Jennie de Pourtales, (who is the deceased daughter of said deceased) aged about 16 years, and residing in Paris, France. And Paul de Beauceie, (son of Polly de Beauceie, who is the deceased daughter of said deceased) aged about 13 years, residing at Paris, France. And Benjamin Holladay, a grand son of said deceased, being the son of Benjamin Holladay, Jr., now deceased, (who was the son of said deceased) residing at Honolulu and aged about 12 years. That at the time the said will was executed, the said testator was over the age of twenty one years, to wit, the age of 56 years, or thereabouts, and was of sound and disposing mind and not under restraint or undue influence or fraudulent misrepresentation, and in ever respect competent by last will and testament to dispose of all of his estate.

That said will is in writing, signed by said testator, and attested by said subscribing witnesses at the request of the said testator, subscribing their names to said will in the presence of said testator and in the presence of each other, and your petitioners are advised and therefore allege that said witnesses at the time of attesting the execution of said will, were and now are competent.

That Henry Hampton, mentioned in said will as one of the executors thereof, is now deceased; that S. L. M. Barlow, mentioned in said will as one of the

executors thereof, is a resident of the State of New York, and declines to act as executor of said will; and the said Joseph Holladay, one of your petitioners herein is the only remaining executor of said will and is a resident and inhabitant of Multnomah County and State of Oregon, and accepts the trust under said will.

Your petitioners further show to the Court that the estate of said deceased is large and owing to its complicated condition, believe that it would be to the best interest of said estate to have an administrator appointed by this Court with the will annexed to act with said Joseph Holladay in administering upon said estate and therefore, ask the appointment of Geo. W. Weidler as such administrator.

Wherefore your petitioners pray that a commission may be issued, directed to some suitable person and who may be competent so to do, residing in the City of Brooklyn in the State of New York, authorizing him to take the testimony of the said subscribing witnesses to said will, in support of the proof of said will, and upon interrogatories prepared and annexed to said commission, and upon the return thereof into this Court the said will may be admitted to probate and established as the last will and testament of said Ben Holladay, deceased, and that said Joseph Holladay be appointed executor of said last will and testament without bonds, and that said Geo. W. Weidler be appointed administrator with the will annexed to act with said Joseph Holladay in administering upon

said estate, and that letters testamentary issue to them in accordance herewith and your petitioners will ever pray.

JOSEPH HOLLADAY.

STATE OF OREGON,

County of Multnomah—ss.

I, Joseph Holladay, being first duly sworn, say that I am one of the petitioners above named and that the foregoing petition is true as I verily believe.

JOSEPH HOLLADAY,

Subscribed and sworn to before me this 8th day of August, 1887.

[Notarial Seal.]

E. B. WILLIAMS,

Notary Public for the State of Oregon.

["Endorsed"]: Filed Aug. 8th, 1887.

WM. CHURCH, JR.,

Clerk.

By B. L. Norden, Deputy.

The Last Will of Ben Holladay now of Harrison, Westchester County, and State of New York.

First: I give, devise and bequenth to my dearly beloved wife, Esther, my late residence in the City of Portland, in the State of Oregon, with the appurtenances and also all the household furniture, plates, books, pictures and stores which may be therein at the time of my decease, and also the sum of fifty thousand dollars. To Have and to Hold to her, her heirs, executors and administrators forever.

Second: I give to my son, Ben Holladay, Junior, all my interest in the Steamships Pelican and Califor-

nia to hold to him and his legal representatives forever.

Third: I give, devise and bequeath all the rest, residue and remainder of my property and estate real and personal wheresoever the same may be situate of which I may be seized possessed or entitled to at the time of my decease to my grand daughter Marie, daughter of my daughter Jennie now deceased, formerly the wife of Count Arthur de Pourtales.

To Have and To Hold to her, her heirs, executors and administrators forever.

Fourth: I declare the foregoing provision in favor of my wife to be in lieu and bar of dower and thirds and marital interests in my estate and I hereby revoke all other wills by me at any time heretofore made and hereby appoint my brother Joseph Holladay of San Francisco, Major Henry Hampton my present agent in Portland and Samuel L. M. Barlow executors of this my last will and testament without security. And I do give them full authority to sell either for cash or upon credit or partly for cash and partly upon credit at public or private sale and convey any or all of my real estate in their discretion and to convert the same or any portion thereof into cash or securities to their satisfaction.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this twenty seventh day of September, one thousand eight hundred and seventy five. Signed, sealed, published and declared by the testator Ben Holladay as and for his last will and testa-

ment in the presence of us who at his request in his presence and in the presence of each other (being all present during the whole time) have hereunto subscribed our names as attesting witnesses the day and year last above written.

BEN HOLLADAY, [Seal.]

George K. Otis,

111 Taylor St., Brooklyn, N. Y.

George F. Otis,

111 Taylor Str. Brooklyn, N. Y.

S. D. Thomas,

229 Sanford St., Brooklyn, N. Y.

["Endorsed"]: Filed Aug. 8th, 1887.

WM. CHURCH, JR.,

Clerk.

By B. L. Norden, Deputy.

BE IT REMEMBERED, That at a reular term of the County Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State, on Monday, the 3rd day of October, A. D., 1887, the same being the first Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present: Hon. JOHN CATLIN, Judge, Presiding.

WHEREUPON, on this Tuesday, the 18th day of October, A. D., 1887, the same being the 10th Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

IN THE MATTER OF THE ESTATE
of
BEN HOLLADAY, Dec'd.

Now at this time coming on the petition of Joseph Holladay, asking for letters testamentary to issue to him under the last will and testament of Ben Holladay, deceased, and the answer to the petition and the said petition herein, Mrs. Esther Holladay, widow of Ben Holladay, deceased, protesting against the issuing of letters testamentary to Joseph Holladay, as executor of the last will and testament of Ben Holladay, deceased, and asking that Rufus Ingalls be appointed administrator of said estate, with the will annexed, and coming on at the same time the motion of Joseph Holladay to strike from the file of this court the said petition and answer, for the reason that it is frivolous, irrelevant, and insufficient, all of which said matters were argued heretofore to-wit: on the day when the said will was probated in this court and which matters were argued, and by the court taken under advisement, after the said argument, and the court having fully considered said matters and the whole thereof, and now being advised and informed as to the law and the facts pertaining to said matters. And it further appearing to the court that said petition and answer of Esther Holladay is frivolous, irrelevant and insufficient and that there is no cause shown in said petition and answer of Esther Holladay why Letters testamentary should not issue under said will, to said Joseph Holladay, as executor

of said last will and testament of said Ben Holladay, deceased. And it further appearing to the court that said Joseph Holladay is named in said will as one of the executors thereof and that Henry Hampton, another of the executors named in said will, has, since the execution thereof, died, and that S. L. M. Barlow is a non-resident of this state and has not applied for letters testamentary under said will, and that said Joseph Holladay is in all respects as required by law duly qualified to act as such executor under said will, and it being admitted upon the said argument by counsel for Joseph Holladay that an administrator could not be appointed to act with said Joseph Holladay as said executor and that thereupon said counsel for Joseph Holladay, withdrew that portion of the petition of said Joseph Holladay asking for the appointment of George Weidler, as administrator of said estate to act in conjunction with said Joseph Holladay, as executor, which request for the withdrawal of said portion was at said time granted and allowed by the Court;

It is now hereby ordered and adjudged by the court that the said motion of Joseph Holladay to strike from the files of this court the said petition and answer of Mrs. Esther Holladay herein is hereby sustained, and the said petition & answer of Mrs. Esther Holladay is stricken from the files of this court.

And it is further ordered and adjudged that said Joseph Holladay is entitled under said will to be the sole executor thereof, and it is hereby further ordered

and adjudged that letters testamentary issue to said Joseph Holladay, as the sole executor of the said last will and testament of said Ben Holladay, deceased, to act as such executor, without bonds or security, upon his taking the oath required by law. And coming up on this day the motion of Mrs. Esther Holladay asking for an order of this court requiring the said Joseph Holladay to give bonds as such executor, and the same being argued by J. H. Mitchell for Mrs. Esther Holladay and E. B. Williams for Joseph Holladay, and the court being fully advised as to said motion,

It is now hereby ordered and adjudged by the court that said motion be and the same is hereby denied and overruled, and said Joseph Holladay is hereby authorized and empowered to act as such executor without bonds or security as such executor.

It is hereby noted that said Esther Holladay shall have and hereby take an exception to all of the above rulings of the court.

JOHN CATLIN,
Judge.

*In the County Court of the State of Oregon in and for
the County of Multnomah.*

IN THE MATTER OF THE ESTATE OF BEN
HOLLADAY, Deceased.

INVENTORY AND APPRAISEMENT.

Moneys belonging to the said estate, which have
come to the hands of the

Furniture in Residence, corner Third and Stark Street, Portland, Oregon.

See extended list on Inventory of Executor.

Appraised at a total of\$ 946.50

Liquors &c., in same residence—See inventory as aforesaid 168.00

Furniture, &c., in building used by Joseph Holladay as office and residence on Fourth Street near Stark—Also office furniture stored in office of Oregon Transfer Co., at Front and “F” Streets—See inventory as aforesaid 346.50

Stock in Willamette Real Estate Company, 5334 shares Stock in Willamette Steam Mills Lumbering & Manfg Co., 675 shares 337,500.00

Stock in Oregon Transfer Company, 1050 shares 63,000.00

Stock in Portland Street Railway Co., 1200 shares 35,000.00

Account against W. L. Halsey’s Stock in Willamette Real Estate Company 1,328.00

Indian Depredation Claim 100.00

Amount carried forward\$438,389.00

REAL ESTATE.

Lots one (1) four (4) six (6) seven (7) and eight (8) in Block Twenty three (23), Couch Addition to the City of Portland 45,000.00

Lot three (3) in Block sixty two (62) City of Portland, with dwelling house thereon	15,000.00
Fractional Block twenty two (22) in Couch Addition to the City of Port- land	6,000.00
Lots numbered one (1) seven (7) and eight (8), in City of Portland, with dwelling thereon	82,000.00
Blocks numbered twenty (20) and thirty seven (37), in Wheeler's Addition to East Portland with improvements thereon	30,000.00
Lot number six (6), in Block 148, City of Portland	3,500.00
	<hr/>
Total	\$619,889.00

STATE OF OREGON,

County of Multnomah—ss.

We, James Steel and Theodore Wygand and.....
.....do solemnly swear that the foregoing is a
correct appraisalment of the property of the Estate of
Ben Holladay, deceased, so far as the same has been
exhibited to us, amounting to Six hundred and Nine-
teen Thousand, eight Hundred and Eighty Nine Dol-
lars.

JAMES STEEL,
THEODORE WYGAND,
J. P. O. LOUNSDALE,

Subscribed and sworn to before me this 31st day of May, 1889.

F. C. WHEELER,

Clerk.

By T. C. Powell, Deputy.

*In the County Court of the State of Oregon in and for
the County of Multnomah.*

INVENTORY AND APPRAISEMENT.

IN THE MATTER OF THE ESTATE OF BEN
HOLLADAY, Deceased.

STATE OF OREGON,

County of Multnomah—ss.

I, Joseph Holladay, the Executor of the Estate of Ben Holladay, deceased, being duly sworn, say that the annexed inventory contains a true statement of all the real and Personal property of the said Ben Holladay deceased, which has come to my knowledge.

JOSEPH HOLLADAY,

Executor.

Subscribed and sworn to before me this 8th day of Sept. 1888.

[Co. Court Seal.]

E. C. WHEELER,

Clerk.

By T. C. Powell, Deputy.

PERSONAL PROPERTY.

Willamette Real Estate Co. Stock, 5334 shares.

Oregon Real Estate Co. Stock—10,000 shares

1228 *The Oregon & California Railroad Co.*

Willamette S. M. L. Mfg. Co. stock—

675 shares	\$337,500.00
Oregon Transfer Co. stock—1050 shares	63,000.00
Portland St. Ry. Co. —1200 shares	35,000.00
Due from Halsey Stock W. R. E. Co.	1,328.00
Indian Depredation Claim	100.00
Seaside House Claim.	

(Nathan Estate.)

Forwarded

Seaside Property

Barn.

- 1 2 horse Farm wagon.
- 1 set (double) wagon Harness.
- 2 Side Saddles.
- Sundry Pieces Cart Harness.
- 1 old stove and pipe.
- 1 feed cutter.
- 9 sections Turned Fence (cedar).
- 9 Turned Posts (cedar).
- 7 iron Tank hooks.
- 1 ladder.
- 1 light Farm wagon & cover.
- 1 plow.
- 1 potato plow.
- Odd pieces pipe, buckets, barrels, tubs, etc.
- 1 old hot water boiler.
- Pieces sewer pipe.
- Pieces Bridge castings.
- 1 harrow.
- 1 rake.

- 1 copper ship's bell.
- 1 coil rope (in use).
- 7 old box stoves.
- 1 hand force pump (D. P. T.)
- 4 window sash.
- 1 old cross cut saw.
- 1 old Hay rack.
- 1 Sulkey hayrack.

Forward.

Forwarded.

Cottage No. 1.

Brussels Carpets—2 rooms & Hall.

- 1 $\frac{3}{4}$ Cedar Bedstead.
- 1 $\frac{3}{4}$ Pine Bedstead.
- 1 Double Bedstead.
- 2 Pine Wash stands.
- 1 Walnut bureau.
- 2 Pr. Chintz curtains.
- 2 green shades.
- 1 fir table.
- 1 baby's chair.
- 1 box stove & Zinc board.

Cottage No. 2.

Worn Runners on Halls.

Room No. 1.

- 3 ply carpet on floor.
- 3 pr. chintz curtains.
- 3 yellow shades.
- 1 $\frac{3}{4}$ Walnut bedstead.
- 1 double Walnut bedstead.

- 1 Walnut Bureau.
- 1 pine washstand.
- 1 top mat.
- 1 fender and shovel.
- 1 gilt framed looking glass.
- 1 Bath tub & Stationary closet.

Room No. 2.

- 1 Double Walnut bedstead.
- 1 3 ply carpet.
- 1 Walnut wardrobe.
- 1 commode and washstand.
- 3 prs. Reps curtains.
- 1 Fire fender & wood box.

Forward.

Forwarded.

Cottage No. 2.

Room No. 3.

1 Copying press & Hardwood stand and chest,
Drawers attached, Drawers, shelves and Gun rack,
empty shells, etc.

- 1 Cedar case containing old stationery.

Room No. 5.

- 1 Old 2 ply carpet.
- 1 double Pine bedstead.
- 1 Pine Washstand.

Room No. 6.

- 1 3 ply carpet.
- 1 double walnut Bedstead.
- 1 walnut commode.
- 1 Pine washstand.

2 yellow shades.

Room No. 7.

1 set cork life preservers.

1 single Pine bedstead.

1 bath chair.

Room No. 8.

1 patched Brussels carpet.

6 yellow shades.

1 3-4 pine bedstead.

2 pine washstands.

1 old mohair settee.

Drawers, shelves, tables hot water boiler, sink, etc.,
and 1 oil stove.

Forward.

Forwarded

Cottage No. 3.

3 ply carpet on hall.

Room No. 1.

3 ply carpet.

1 double pine bedstead.

1 walnut bureau.

1 walnut washstand.

3 yellow shades.

Room No. 2.

1 3 ply carpet.

1 double pine bedstead.

1 ash washstand.

1 yellow shade.

Room No. 3.

1 yellow shade.

Stationery closet & sink.

Room No. 4.

1 yellow shade.

1 2 ply carpet.

1 double pine bedstead.

1 pine washstand.

1 small looking glass & frame.

Upstairs.

2 ply carpet on 2 rooms & hall.

3 double pine bedsteads.

3 green shades.

1 walnut wash stand.

Dairy House.

1 wood butter churn.

1 wood butter worker.

110 tin milk pans.

1 tin gallon measure.

1 fir table.

Forward.

Forwarded.

Dairy House.

3 kegs.

3 stone jars.

4 milk pans.

1 tin skimmer.

1 small looking glass.

1 large tin washpan.

5 milk buckets.

1 iron furnace kettle.

1 ax.

Farm House.

1 double pine bedstead.

.... 2 single pine bedsteads.

2 Eureka & Spring mattresses.

1 straw mattress.

2 pine bureaus.

2 pine tables.

1 pine small stand.

4 pine chairs.

3 db'l grey blankets.

1 sing grey blanket.

2 pillows.

1 lamp

1 work bench

2 hand saws

1 ax.

1 pick

....

candlestock.

1 rifle.

1 augur.

1 looking glass.

1 file.

1 hatchet.

1 meat safe.

Forward.

Forwarded.

Pump House.

1 steam upright boiler and donkey engine.

1 steam pump.

1 frame & Belting for stationery cut off saw.

1234 *The Oregon & California Railroad Co.*

2 old solid tooth C O saws.

1 ax.

1 small saw and saw buck.

1 oil can.

1 monkey and pipe tongs.

1 funnel & sundry small tools.

Tank house and Wooden Tank.

1 cross cut saw.

1 meat safe.

1 old wheel barrow.

1 scoop shovel.

1 augur.

1 pr. soldering irons.

Cloutrie House.

Room No. 41.

2 ply carpet.

1 ash D bedstead.

1 pine table and towel rack.

1 cottage bureau.

1 cottage washstand.

1dbl. Eureka & spring mattress.

3 blue shades.

1 top rug.

1 pr. andirons.

Forward.

Fordwarded.

Room No. 40.

1 2 ply carpet.

1 dbl. Ash bedstead.

1 dbl. Eureka & Spring mattress.

1 pine wash stand.

1 pine wash stand.

1 small look glass.

1 blue shade.

Room No. 39.

1 2 ply carpet.

1doub. pine bedstead.

1 dbl. Spring and Eureka mattress.

1 pine wash stand.

1 look glass.

1 blue shade.

Large room.

2 pine bedsteads.

2 Eureka & Spring mattresses.

2 straw mattresses.

.... 2 pine wash stands.

5 pine stands.

3 pine rockers

4 Mohair easy chairs.

3 rawhide chairs.

5 blue shades.

1 rep lounge.

5 look glasses

.... Room No. 45.

1 2 ply carpet.

1 double ash bedstead.

1 Eureka & Suring mattress.

Forward.

Forwarded.

1 pine stand.

1236 *The Oregon & California Railroad Co.*

1 pine wash stand.

1 blue shade.

1 look glass.

Room No. 44.

1 2 ply carpet.

1 doub. ash bedstead.

1 Eureka & Spring mattress.

1 pine wash stand.

1 pine stand.

1 look glass.

1 blue shade.

Hall & Stair runners.

1 door mat.

1 pine stand.

2 blue shades.

Room No. 53 & Suite.

3 2 ply carpets.

2 doub. ash bedsteads.

2 Eureka & Spring mattresses.

1 Baby's bed & Mattress.

1 cottage bureau.

3 pine stands.

1 box stove 4 jts. pipe & Zinc Bed.

1 look glass.

5 blue shades.

Room No. 50.

Closet & Stationery sink.

10 standard cots.

Forward.

Forwarded.

Room No. 52.

- 1 2 ply carpet.
- 1 dbl. ash bedstead.
- 1 Eureka spring & mattress.es
- 1 pine stand.
- 1 pine wash stand.
- 1 look glass.
- 2 blue shades.

No. 52.

- 1 2 ply carpet.
- 1 dbl. ash bedstead.
- 1 Eureka & Spring mattress
- 1 pine stand.
- 1 pine washstand.
- 1 look glass.
- 1 blue shade.

Room No. 49.

- 1 2 ply carpet.
- 1 sing. piece bedstead.
- 1 Eureka & Spring mattress.
- 1 pine wash stand.
- 1 pine stand.
- 1 look glass.
- 1 blue shade.

Room No. 48.

- 1 2 ply carpet.
- 1 dbl. ash bedstead.
- 1 Eureka & Spring mattress.
- 1 pine stand.
- 1 pine wash stand.

1 look glass.

2 blue shades.

Forward.

Forwarded.

Room No. 47.

1 Doub, ash bedstead.

1 Doub. Eureka & Spring Mattress.

1 pine wash stand.

1 pine stand.

1 look glass.

1 blue shade.

Room No. 46.

1 2 ply carpet.

1 doub. ash bedstead.

1 Eureka & Spring Mattress.

1 pine wash stand.

1 pine stand.

1 look glass.

1 blue shade.

Laundry & Annex to Cloutrie House.

100 ft. 3-4 garden hose.

1 cane chair.

1 chest shelves.

1 "Dish up" table.

1 old pine table.

1 green shade.

1 yellow shade.

.... 9 doz lamp chimneys.

7 reflectors.

2 doz. brass lamps.

4 doz. glass lamps.
4 doz. tin candlesticks.
2 pr. lamp scissors.
1 glass cutter.
Lamp wicks extra.
Trimnings & parts of lamps.

Forward.

Forwarded.

2 doz. Hotel candles.
Various broken lamps & lanterns.
1 Japanese table.
27 joints pipe & 1 elbow.
1 iron fireboard.
3 box stoves.
3 zinc boards.
2 blue shades.
1 old 2 ply carpet.
1 pine washstand.
1 rawhide chair.
1 single pine bedstead.
2 straw mattresses (single).
2 pr. gray doub. blankets.
2 sheets.
1 counterpane.
2 pillows.
2 stips.
1 wash bowl.
1 pitcher.
1 tin candle stick.
1 pc. China matting.

2 old door mats.

Ironing room.

1 fluter.

4 wringers.

1 ironing table.

1 blue shade.

1 pine table.

12 irons.

China sleeping room.

7 cot bedsteads.

Odd pieces carpeting.

Forward.

Forwarded.

1 odd green chair.

2 odd cane chairs.

4 rawhide chairs.

4 single straw mattresses.

1 small look glass.

2 hand grenades.

Wash Room.

2 old rawhide chairs.

1 wash tub.

1 wash basket.

1 stove, 7 jts. pipe & 2 elbows.

1 zinc board.

1 old cook stove.

1 old cook stove (Box).

4 wash boards.

4 buckets.

1 pc. hall carpet.

- 2 cedar tubs.
- 1 tin wash boiler.
- 1 pr. scissors.
- 1 box clothes pins.

Store Room (Cloutrie House.)

Sundry Paint Buckets & Brushes.

- 3 pine wash stands.
- 1 old Barber's chair.
- Sundry pc. hall matting.
- 2 sing. pine bedsteads.
- 1 cot.
- 3 sing. straw mattresses.
- 3 green shades.
- 1 rawhide chair.
- 1 hall mat.
- 1 tin candlestick.

Forward.

Forwarded.

Seaside House "Proper".

Room No. 1.

- 1 3 ply carpet.
- 1 doub. ash bedstead.
- 1 sing. pine bedstead.
- 1 doub. Eureka & Spring mattress.
- 1 doub. Eureka & Top mattress.
- 1 single Eureka & Spring Mattress.
- 1 single Eureka & Top Mattress.
- 3 feather pillows.
- 1 pine wash stand.
- 1 cottage.

1 green shade.

1 pr. chintz curtains.

1 look glass.

Room No. 2.

1 2 ply carpet.

1 box stove elbow & 4 jts. pipe.

1 zinc board.

1 cottage set furniture (Doub.).

1 China spittoon.

1 China slop jar.

1 washbowl & pitcher.

1 soap mug.

1 chamber.

2 towles.

1 doub. & Eureka Spring spring mat.

1 doub. & top Spring mat.

2 sheets.

1 counterpane.

3 pr. white doub. blankets.

2 feather pillows.

1 lamp.

Forward.

Forwarded.

1 tumbler.

1 mat safe.

1 green shade.

1 pr. Chintz curtains.

1 rawhide chair.

Room No. 3.

1 3 ply carpet.

1 doub. cottage bedstead.

1 Eureka spring mat.

1 cot. tabble.

1 pine washstand.

1 look glass.

1 green shade.

1 pr. calico curtains.

1 slop jar.

Room No. 4.

1 2 ply carpet.

1 Doub. cottage set.

1 green baize chair.

1 shade.

1 pr. cal. curtains.

1 cheap picture and frame.

1 pine table & cover.

1 doub. Eureka & Spring Matt.

1 doub. Eureka & Top Matt.

2 sheets.

2 feather pillows.

3 pr. doub. white blankets.

1 doub. counterpane.

1 small mat.

1 box stove 4 jts, pipe 7 elbows.

1 zinc board.

Forward.

Forwarded.

1 washbowl & pitcher.

1 slop jar & chamber.

1 soap mug & spittoon.

4 tumblers.

1 match safe.

Room No. 5.

1 3 ply carpet.

1 doub. set cottage furniture.

1 rawhide chair.

1 wash bowl & pitcher.

1 chamber & spittoon.

1 match safe & soap mug.

1 slop jar.

1 tumbler.

4 towels.

1 doub. Eureka & Spring Mat.

1 doub. Eureka & Top Mat.

1 counterpane.

2 sheets.

2 pillow slips.

3 pr. doub. white blankets.

1 shade.

1 pr. calico curtains.

Room No. 6.

1 3 ply carpet.

1 dbl. ash bedstead.

1 Eureka & spring mat.

1 Eureka & top mat.

2 feather pillows.

1 cottage bureau.

1 ash wash stand.

1 pine stand.

1 towel rack.

1 green shade.

Forward.

Forwarded.

Room No. 7.

1 3 ply carpet.

1 dbl. pine debstead.

1 Eureka & Spring mat.

1 Eureka & Top Spring mat.

2 feather pillows.

1 look glass.

1 pine stand.

1 pine wash stand.

1 green shade.

Room No. 8.

1 3 ply carpet.

1 Doub. Ash bedstead.

1 Doub. Eureka & Spring mat.

1 pine stand.

1 cottage wash stand.

1 cottage towel rack.

1 look glass.

1 green shade.

2 feather pillows.

Room No. 9.

1 2 ply carpet.

2 dbl. pine bedsteads.

3 Eureka & Spring mats.

2 feather pillows.

1 pine wash stand.

1 pine bureau.

2 pine Towel racks.

1 green shade.

Forward.

Forwarded.

Room No.

1 2 ply carpet.

1 Doub. pine bedstead.

1 Eureka & Spring mat.

1 pine wash stand.

1 look glass.

1 shade.

Room No. 11.

1 3 ply carpet.

1 doub. pine bedstead.

1 Eureka & Spring mat.

1 $\frac{3}{4}$ pine bedstead.

1 Eureka & Spring mat.

1 pine wash stand.

1 pine stand.

1 look glass.

1 green shade.

3 feather pillows.

Room No. 12.

1 2 ply carpet.

1 doub. pine bedstead.

1 Eureka & Spring mat.

2 feather pillows.

1 green shade.

1 look glass.

1 pine stand.

1 pine wash stand.

Forward.

Forwarded.

Room No. 13.

1 2 ply carpet.

1 doub. pine bedstead.

1 Eureka & Spring mat.

1 pine stand.

1 pine wash stand.

1 look glass.

2 feather pillows.

1 green shade.

Room No. 14.

1 3 ply carpet.

1 doub. pine bedstead.

2 feather pillows.

1 doub. Eureka & Spring Mat.

1 green shade.

1 pine wash stand.

1 pine stand.

1 look glass.

Room No. 15.

1 2 ply carpet.

1 doub. cottage bedstead.

1 $\frac{3}{4}$ pine bedstead.

1 doub Eureka & Spring Mat.

1 $\frac{3}{4}$ Eureka & Spring Mat.

3 feather pillows.

1 cottage wash stand & Bureau.

1 towel rack.

1 green shade.

Forward.

Forwarded.

Room No. 16.

1 2 ply carpet.

1 cottage set furniture.

1 box stove 4 jts. pipe, elbow & zinc.

1 green shade.

2 feather pillows.

1 doub. Eurka & Spr. mat.

Room No. 17.

1 cottage set furniture (Double).

1 doub. Eureka & Spring mat.

3 feather pillows.

1 3 ply carpet.

1 $\frac{3}{4}$ pine bedstead.

1 Eureka & Spring mat.

1 green blind.

Room No. 18.

1 2 ply carpet.

1 cottage set furniture (Dbl.)

1 doub. Eureka & Spring mat.

2 feather pillows.

1 green shade.

Room No. 19.

1 2 ply carpet.

1 doub. set cottage furniture.

1 doub. Eureka & Spring mat.

2 feather pillows.

1 green shade.

Forward.

Forwarded.

Room No. 20.

1 2 ply carpet.

1 doub. set cottage furniture.

2 Eureka & Spring mats.

1 $\frac{3}{4}$ Eureka & Spring mat.

4 feather pillows.

1 green shade.

Room No 21.

1 2 ply carpet.

1 doub. cottage set furniture.

3 green blinds.

1 doub. Eureka & Spr. mat.

1 sing. Eureka & Spr. mat.

3 feather pillows.

1 single pine bedstead.

Room No. 22.

1 Brussells carpet.

1 green blind.

1 doub. cottage bedstead.

1 cottage stand.

1 doub. Eureka & Spring mat.

1 $\frac{3}{4}$ pine bedstead.

1 $\frac{3}{4}$ Eureka & Spring Mat.

3 feather pillows.

1 ash bureau.

1 pine stand.

Forward.

Forwarded.

- 1 2 ply carpet.
- 1 doub. cottage set.
- 2 green blinds.
- 1 feather duster.
- 1 double Eureka & Spring mat.
- 1 double Eureka Top mat.
- 4 feather pillows.
- 30 single gray blankets.
- 40 double gray blankets.
- 91 double white blankets.
- 18 single white.

Room No. 24.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ Pine bedstead.
- 1 3-4 Eureka & Spring mat.
- 1 3-4 Eureka top mat.
- 1 pillow.
- 1 pine wash stand.
- 1 pine stand.
- 1 green shade.
- 1 look glass.

Room No. 25.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ Eureka & Spring mat.
- 1 3-4 Eureka top mat.
- 1 pillow.
- 1 pine wash stand.
- 1 pine stand.
- 1 green shade.

1 rawhide chair.

Forward.

Forwarded.

Room No. 26.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ pine bedstead.
- 1 pine wash stand.
- 1 pine stand.
- 1 $\frac{3}{4}$ Eureka & Spring mat.
- 1 3-4 Eureka Top mat.
- 1 pillow.
- 1 Look glass.
- 1 green shade.

Room No. 27.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ Pine bedstead.
- 1 pine wash stand.
- 1 pine stand.
- 1 $\frac{3}{4}$ Eureka & Spring mat.
- 1 3-4 Eureka Top mat.
- 1 pillow.
- 1 look glass.
- 1 green shade.

Room No. 28.

- 1 3 ply carpet.
- 1 $\frac{3}{4}$ pine bedstead.
- 1 3-4 Eureka & Spring mat.

-
- 1 pine wash stand.
 - 1 pine stand.

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- 1 pillow.
- 1 green shade.
- 1 look glass.

Forward.

Forwarded.

Room No. 29.

- 1 $\frac{3}{4}$ Pine bedstead.
- 1 Pine wash stand.
- 1 3-4 wash stand.
- 1 3-4 Eureka & Spring mattress.
- 1 pillow.
- 2 floor mats.
- 1 look glass.
- 1 green shade.

Room No. 30.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ Pine bedstead.
- 1 3-4 Eureka & Spring matt.
- 1 pillow.
- 1 pine wash stand.
- 1 pine stand.
- 1 japanese.
- 1 look glass.
- 1 rawhide chair.

Room No. 31.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ Pine bedstead.
- 1 3-4 Eureka & Spring matt.
- 1 pillow.

- 1 green shade.
- 1 look glass.
- 1 pine stand.
- 1 pine wash stand.

Forwad.

Forwarded.

Room No. 32.

- 1 2 ply carpet.
- 1 pine doub. bed stead.
- 1 doub. Eureka & Spring Matt.
- 2 pr. doub. white blankets.
- 2 feather pillows.
- 2 sheets.
- 1 counterpane.
- 1 pine bureau.
- 1 pine wash stand.
- 1 pine stand.
- 1 cottage rocker.
- 1 rawhide chair.
- 2 small mats.
- 3 towels.
- 1 lamp.
- 1 wash bowl & pitcher.
- 1 tumbler.
- 1 soap mug.
- 2 green shades.

Room No. 33.

- 1 $\frac{3}{4}$ pine bedstead.
- 1 straw tick.
- 1 piece 3 ply carpet.

- 1 pine wash stand.
- 1 cottage chair (broken).
- 1 green shade.
- 1 look glass.
- 1 pillow.

Forward.

Forwarded.

Room No. 34.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ pine bedstead.
- 1 3-4 Eureka & Spring mat.
- 1 pillow.
- 1 pine wash stand.
- 1 pine stand.
- 1 rawhide chair.
- 1 look glass.
- 1 green shade.

Room No. 35.

- 1 3 ply carpet.
- 1 pine $\frac{3}{4}$ bedstead.
- 1 straw tick.
- 1 pine wash stand.
- 1 green shade.
- 31 rulu pillows.
- 25 feather pillows.
- 1 green shade.

Room No. 36.

- 1 2 ply carpet.
- 1 $\frac{3}{4}$ pine bedstead.
- 1 3-4 Eureka & Spring matt.

1 pillow.
1 green shade.
1 pine washstand.
1 pine stand.
1 looking glass.

Forward.

Forwarded.

Room No. 37.

1 2 ply carpet.
1 $\frac{3}{4}$ pine bedstead.
1 3-4 Eureka & Spring matt.
1 pillow.
1 pine wash stand.
1 pine stand.
1 green shade.
1 looking glass.

Upstairs.

1 pine table.
1 hanging lamp.
1 call bell.

Hall matting.

2 green shades.

Linen Closet.

61 doub. bed spreads (new).
52 single bedspreads.
90 doub. sheets.
109 single sheets.
74 doub. pillow slips.
109 single pillow slips.
252 towels.

30 bath towels.
176 napkins.
35 table cloths.
12 roller towels.
8lunch cloths.
9 spittoons.
28 chambers.
9 slop jars.
27 pitchers.

Forward.

Forwarded.

35 bowls.
32 soap dishes.
18 match safes.
1 hassock.
1 looking glass.
11 small table covers.
1 carpet sweeper.

Lower Hall & Office.

1 chandalier.
1 8 day clock.
Call bells, etc.
Office desk counter & P. O. Box.
Keyboard & Closet.
8 ink stands.
Fire extinguishers.
1 Japanese table.
1 Rawhide chair.
1 Walnut & Baize office desk.
1 lamp bracket.

- 2 office stools.
- 1 pen rack.
- 1 Tilton & McFarland safe.
- 2 cork screws.
- 1 cuckoo clock.
- 2 table brushes.
- 4 sets carvers.
- 6½ doz. table knives.
- 8 doz. table spoons.
- 11½ doz. table forks.
- 8½ doz. teaspoons.
- 9 butter knives.
- 14 nut crackers.

Forward.

Forwarded.

Billiard Room.

- 1 Old Phelan & Calender Table.
- Cue rack.
- 4 balls.
- 12 cues & Bridge.
- 110 rawhide chairs & rockers.
- 1 feather duster.
- 1 pool board.
- 1 lamp bracket.

Gent's Bath Room.

- 2 bath tubs.
- 1 rawhide chair.
- 1 lamp bracket.
- 1 towel rack.
- 1 look glass.

Parlor.

- 1 tapestry carpet.
- 5 green shades.
- 5 pr. white curtains.
- 1 large mirror.
- 1 large look. glass.
- 36 doub. Eureka top mattresses.
- 13 single Eureka top mattresses.
- 7 doub. Eureka & Spring mattresses.
- 2 $\frac{3}{4}$ Eureka & Spring mattresses.
- 2 single Eureka & Spring mattresses.
- 1 square piano.
- 4 covered settees.
- 2 sets chandeliers.
- 16 rawhide chairs.
- 3 rockers.
- 1 M T Center table.

Forward.

Forwarded.

- 1 large table.
- 5 cornices.
- 5 brackets.
- 1 walnut whatnot.
- 4 pictures walnut frames.
- 1 walnut breakfast table.

Reading room.

- 1 walnut table.
- 1 bar counter & Case.
- 12 rawhide chairs.
- 5 slop jars.

2 foot baths.

25 soap dishes.

14 spittoons.

25 chambers.

33 water pitchers.

31 water bowls.

18 match safes.

Dining room.

11 dining tables.

8 side tables.

68 rawhide chairs.

6 babies' chairs.

1 walnut M. F. side board.

1 napier runner.

Pantry.

7 large castors.

2 small cruets.

2 old urns.

4 soap urns.

8 cov. veg. dishes.

Forward.

Forwarded.

1 glass vase.

8 china cake dishes.

13 salid dishes.

12 glass cake dishes.

8 glass fruit dishes.

9 celery glasses.

10 water pitchers.

32 creamers.

5 iron stone syrup mugs.
8 glass syrup mugs.
24 iron stone pickle dishes.
14 iron stone sugar bowls.
100 goblets.
60 straight glasses.
36 beer, sherry & Claret glasses.
12 tooth pick glasses.
16 salt dishes.
14 Individ. dishes.
70 Individ. Butter dishes.
31 ice cream dishes.....
12 large platters.
13 small platters.
80 soup plates.
36 dinner plates.
22 breakfast plates.
50 pie plates.
170 "Dish up" dishes, various sizes.
100 pudding dishes.
40 blk. coffee cups & saucers.
18 coffee cups.
1 cupboard, shelves, etc.
1 pine table.
1 dinner bell.
1 dust brush.

Forward.

Forwarded.

Kitchen.

13 coffee cups.

- 12 coffee saucers.
- 1 large platter.
- 4 small platters.
- 16 side plates.
- 3 salad dishes.
- 2 yellow salad mixers.
- 3 pickle dishes.
- 6 pie plates.
- 1 bowl.
- 1 dish pan.
- 1 skimmer.
- 1 calunder.
- 2 ladles.
- 2 large spoons.
- 2 cake turners.
- 1 grater.
- 2 buckets.
- 1 funnel.
- 6 pie pans.
- 1 lemon squeezer.
- 2 large drip pans.
- 3 sauce pans & covers.
- 1 small T pot.
- 1 small coffee pot.
- 3 frying pans.
- 1 range (2 oven).
- 1 pine table.
- 1 cutting table.
- 5 rawhide chairs.
- 1 doz. knives.

1 doz forks.

1 doz T spoons.

Forward.

Forwarded.

Kitchen.

1 doz table spoons.

1 chop bowl & knife.

1 clock.

1 look glass.

2 cupboards.

1 meat saw and cleaver.

1 tin bucket.

1 boiler.

1 coffee mill.

1 rolling pin.

1 flour sifter.

Servants' Dining Room.

1 pine dining table.

1 dish up table.

1 table cloth.

3 goblets.

1 small cruet.

2 sugar bowls.

1 doz. assorted dishes.

1 small tin pot.

6 rawhide chairs.

3 doz. cups & saucers.

1 ice pick.

2 steam pans.

Forward.

Forwarded.

Store Room.

1 cheese safe.

14 muffin rings.

1 egg beater.

6 flesh forks.

5 large cook spoons.

3 cake turners.

1 skimmer.

1 brass kettle.

3 meat broilers.

4 stew pans.

3 small frying pans.

1 large frying pan.

1 soup boiler.

1 large kettle.

1 large dish pan.

7 drip pans.

4 Japanese trays.

1 porcelain kettle.

1 large tea pot.

1 strainer.

1 flour bowl.

1 water cooler.

1 ice cream freezer.

Small pans, spoons, etc.

1 iron teakettle.

Forward.

Forwarded.

Third Street Residence.

Front Hall.

Brussels carpet.

2 Brussels mats.

1 chandelier 50.00

1 Walnut & Marble Hall rack.

1 oil painting and Gilt frame.

Hall stair carpets & rods.

Front parlor.

Brussels carpet.

Brussels mat 20.00

1 Green Plush Lamberquin.

1 Green Plush settee 10

1 Fire Fender.

1 large plate glass mirror 40

1 large looking glass 10

2 white shades50

2 large Walnut tables 10

1 Walnut Escretoire 15

1 Walnut & Leather chair 5

2 ash chairs 1.50

1 rawhide chair50

1 doub. spring & Eureka Mat.

1 doub. Hair Mat.

2 doub. Sheets.

1 doub. spread.

2 pr. doub. white blankets.

1 walnut commode 1.00

1 Extension chandelier 3

3 large oil paintings 25

1 inkstand	0.00
1 spittoon	0.00
2 feather pillows	

Forward	191.50
Forwarded	191.50

Front Parlor.

1 walnut washstand	
1 Bronze image	5.00

North Parlor.

1 Brussels carpet	15.00
6 white shades	3
1 upright Steinway piano	100
1 green plush settee	10
4 green plush easy chairs	15
1 Walnut piano stool	1
2 Brussels mats	0.00
1 Fancy worked Hall chair	2.50
1 plate glass mirror	30.00
1 Reps Lamberquin & Walnut Frame	10
1 4 lt. chandelier	5
4 globes	
1 fancy Bronze clock	10
2 Parian statutes	4
1 match safe	0.00
1 walnut & plate glass "Stagne"	10
2 small lithographs50
1 small Walnut stand50
1 marble & walnut table	5
1 large French Music box	25

1 mantle Lamberquin	1
1 mantle green plush.	
2 landscape oil paintings	20
2 (Mrs. H. & Mrs. W.) oil paintings	1.00
1 Moss wreath & Frame.	
2 steel engravings & walnut frames	7

Forward	472.00
Forwarded	472.00

Dining Room.

Brussels carpet	5.00
1 6 Lt Chandelier & Globes	\$ 7.50
5 white shades	1.50
6 oak dining chairs	3.00
2 oak & M T Side boards	50.00
1 silver Pitcher & Tray50
2 silver salt & pepper50
1 oak extension table	10.00
1 oak side table	5.00
1 walnut Bluegrass Vase50
4 steel engravings (Walnut Frames)	10.00
1 Photograph. Residence (Walnut Frame.)	
1 Oil Painting. Flowers (Gilt Frame.)	
1 piece Coral.	
1 Reps & Walnut Easy chairs.....	5.00
1 cashmere table cover.	
1 china cuspedore.	
3 walnut cornices.	

Library.

1 Brussels carpet	1.00
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2 white shades	1.00
1 Pine and Walnut book case.	
containing 60 histories and other works	20.00
15 patent office reports.	
3 vols bound household papers.	
1 Atlas & other minor works.	
1 Walnut wash stand.	
1 Walnut & M T Bureau	10.00
3 Photographs & Frames	
1 group photograph and frame.	
1 Lithograph (St. Anthony)	
Forward	\$602.50
Forwarded	\$602.50

Library.

2 Gas jets and Globes50
1 Walnut chair	1.00
2 cuspedores	
1 pine turned 3-4 bedstead	
1 feather pillow	3.00
1 3-4 Euerka & Spring Mat	
1 Photograph "Ophir Farm."	

Back Hall.

Hall carpet.

1 white shade.	
1 Photograph "Ocean Scene"	3.00
2 pr. white doub. blankets	

Pantry.

1 Loviland Icechest.	
1 figured tea set.	
1 figured dinner set.	5.00

Odd pieces china ware.

1 chandelier & 2 globes.

Kitchen.

1 large range (1 oven)

& Pat Boiler.

4 Rawhide chairs.

1 3 lt. chandelier 10.00

2 pine tables.

Odd pcs kitchen furniture

Laundry.

1 rawhide chair.

1 old stove and kettle 1.00

1 oak table.

\$626.00

Forwarded 626.00

Up stairs. Front hall.

1 Brussels carpet 3.00

2 Mohair chairs 1.00

1 hall rack M T & Walnut 10.00

1 sing Lt. Chandelier & Globe 1.00

2 litographs & Frames 1.00

Front bedroom.

2 small brass canons

2 Brussels carpets 4.00

4 white shades 1.00

South Bed Room.

1 Brussels carpet 2.00

1 Mohair settee 5.00

1 Walnut Breakfast table 1.00

3 rawhide chairs	
1 white shade	
1 look glass	2.00
1 "Greek Slave."	
1 photo Mrs. H.	
1 Feather wreath and frame	
1 "Innocence" Print	
2 "Children"	1.00
2 Chromos & Walnut frames	
East bedroom.	
1 Brussels carpet.	
1 Brussels mat.	
1 stove 3 jts pipe and elbow.	5.00
1 zinc board	
1 set walnut M T Bedroom furniture	
1 3-4 walnut bedstead	50.00

Forward	\$713.00
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Forwarded	\$713.00
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East Bedroom.

1 doub. spring mat.	
1 3-4 spring mat.	
1 3-4 hair mat	12.00
1 doub. hair mat	
3 Feather pillows	
1 bolster	2.00
1 walnut table	2.00
5 white shades	1.00
6 pr. white doub. blankets	6.00
1 chandelier & Globe	

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6 prints & Walnut Frames	1.50
1 Rep & Walnut rock chair	1.00
2 rawhide chairs	1.00
Large Bedrooom.	
1 Brussels carpet	10.00
1 doub Rosewood M T Bedroom set	80.00
1 walnut center table	3.00
1 doub. spring mat	10.00
1 doub. hair mat	
1 pr. white blankets	1.00
2 feather pillows	1.00
1 Green plush settee	7.00
1 plate glass mirror	30.00
1 walnut desk	5.00
1 rosewood wardrobe	25.00
6 white shades	
1 China easy Chair	1.00
3 Reps Bedroom chairs	2.00
9 Litographs and Walnut Frames	
2 Photos, 1 group & Walnut Frames	10.00
1 cuspedore	
Forward	\$924.50
Forwarded	\$924.50
Rooms in Rear.	
3 Brussels carpets	
4 cedar wardrobes (stationery)	
1 single bedstead.	
1 chair.	
2 small pictures	
1 M T & Walnut bureau	20.00

1 Holaday Family Group
 1 bath tub
 1 doub. Walnut bedstead.
 $\frac{3}{4}$ Eureka & Spring Mat.
 2 Hair

Middle Bath Room.

1 single light chandelier
 1 Brussels carpet 1.00
 Back Hall.

Brussels Carpet.

1 white shade 1.00
 1 single Lt. Chandelier
 Cellar

1 Boynton Furnace 0.00
 1 Large Ice Chest. 0.00

Forward \$946.50

Total Third St. Residence Furniture.

Forwarded.

Wine Room.

1 Jug whiskey, 2 gal more or less.
 1 Jug Peach Brandy, 5 gal more or less.
 1 Jug whiskey, 5 gal more or less
 1 Jug whiskey, 4 gal more or less.
 1 Jug whiskey, 4 gal more or less.
 1 Jug whiskey, 4 gal more or less.
 1 Jug whiskey, 1 gal more or less.
 1 Jug whiskey, 2 gal more or less.

110.00 —

1 Jug whiskey, 3 gal more or less.

1 Jug whiskey, 4 gal more or less.	
1 Jug whiskey, 1 gal more or less.	
1 Jug whiskey, 1 gal more or less.	
1 Jug whiskey, 1 gal more or less.	
2 Jugs whiskey, 5 gal more or less.	
1 Jug whiskey, 1 gal more or less.	
2 empty barrels.	
6 empty 5 gal jugs	7.00
Dimejohn 1-2 gal sherry	
1 Dimejohn 3 gal rum.	15.00
1 Dimejohn 2 gal whiskey	
27 Qt. Bottles Asst Town wines (rebottled.)	
2 Qt. Bottles Champagne	
3 Qt. Bottles Vicky water.	10.00
3 Qt. Bottles olive oil.	
4 sealed cases claret	25.00
6 small bots. table sauce	
1 small bots. peper	
4 bots. pickles	
2 bots. gin	1.00
1 bot. bitters	

Total liquors &c 3rd St Residence ... \$168.00

Forwarded.

Office 4th Street.

Brussels carpet, 1 room & Hall	5.00
2 ply carpet, 3 rooms	20.00
3 white shades	
2 yellow shades	2.00
1 walnut & Figd. silk sittee	15.00

1 walnut & M T Bedroom Suite.....	50.00
2 Walnut & Figd. silk Easy chairs	8.00
10 Walnut & Figd. silk Easy chairs	1.00
3 green plush Easy chairs	15.00
1 green plush sofa pillow	1.00
2 Lgd M T walnut center tables	15.00
1 small M T walnut center tables	1.00
2 small walnut stands	2.00
1 stove zinc board & 4 jts pipe	2.50
1 cuspedore.	
3 gilt cornices.	
2 rawhide rockers	5.00
1 fire fender and tongs.	
1 looking glass	5.00
1 3 lt. chandelier	
2 chandelier 2 side lights	3.00
5 globes	
4 water color & Frames	
3 litographs	7.00
1 wastepaper basket	
1 leather & Walnut reclining chair	3.50
1 walnut desk & Drawers	20.00
1 oak ext. dining table	8.00
2 pine Doub. bedsteads	5.00
1 pine wash stand.	
1 Reps Easy chair	7.50
2 Mohair Easy chairs	
1 Photo E. D. Baker.	
Forward	\$201.50
Forwarded	\$201.50

Office 4th Sreet.

1274 *The Oregon & California Railroad Co.*

2 Photo frames	
12 old shades	
1 Winchester rifle	25.00
Various books and papers	
3 walnut & cane chairs	
1 mohair chair.	
3 cane chairs	3.00
7 cane chairs (ash)	
4 feather pillows	2.00
1 Doub. Spring Mat	
1 Doub. Wood top Mat.	
3 Doub. White Blankets	10.00
1 Doub. red blanket	
1 Tilton & McFarland Safe	
2 Cedar tables	50.00
1 bath tub	
Stored in O T Cos. Office.	
1 Mahogeny rule	
1 Walnut stand rest	
1 Tin paper cutter	
1 Well & Brush	
1 Walnut and baize top table	
1 poplar table	
1 ash and Cedar desk	
1 walnut Escritoire	
1 Port Oxford Cedar cabinet	50.00
Drawers & Pigeon holes	
1 small cedar cabinet	
1 copying press (4th St)	3.00
2 ash chairs (cane Bot.)	

1 arm oak & Cane chair

1 letter scale

Forward \$344.50

Forwarded \$344.50

Office 4th St.

2 penracks

1 long cane bottom settee

Cushion & Pillow 2.00

Total Fourth St. & O T Co Office \$346.50

Live Stock.

12 spring calves

14 yearlings

21 cows

1 bull

2 2 yr. old heifers

2 sows

9 pigs

1 horse "Old Jim"

75 lbs butter.

Forward

Forwarded

Real Estate.

Seaside Property.

Lots 1 and 2 and S 1-2 SE 1-4 Sec 29 T 6 N R 10

W M 172 acres.

Improvements.

Seaside House.

3 cottages, Barn, Fences & out buildings.

19 48-100 acres near Seaside.

76 12-100 acres near Seaside.

28 78-100 acres near Seaside.

all in Clatsop County, Or.

Cloutrie Farm

The whole of the Donation Claim of Mrs. Eliza Lou-
trie situated in Secs. 21 and 28 T 6 N R 10 W W M
Clatsop County, Or. all under fence.

Polk County Farm.

All the donation claim of Thos. H. Hunsaker situate
in T 6 S R 6 & 7 W W M. 640 acres. All N W 1-4
Sec 25, T 6 S R 7 W. 160 acres.

Part west end of NW 1-4 Sec 30 T 6 S R 6 W. 51
acres.

Part Sec 26 T 6 S R 7 W 320 acres.

About 300 acres fenced.

Forward.

Forwarded.

Cornelius Farm.

Part Donation Claim of J. W. Linn, situate in NW
1-4 Sec 11 T 1 S R 3 W. 25 acres.

Part Donation Claim of B. Q. Tucker, About 540
acres.

About 300 acres fenced.

Clarendon Hotel Property.

Lots Nos. 1, 4, 6, 7 & 8 in Block 23 City of Portland.

No improvements 45,000.00

Lattie Farm.

Part of the Wm Lattie Donation Claim situated in
Sec. 28 T 6 N R 10 W. 172 acres. Improvements. Fr.
House & partly fenced.

Lot 3 in Block 62 in City of Portland

Improvements

2 story Dwel. House15,000.00

Frac Block 22 in City of Portland

Improvements, small frame building6,000.00

Forward.

Forwarded.

Residence Property

Lots Nos. 1, 7 and 8 in Blk 47 City of Portland.

Improvements. 2 story Dwelling house.

on Cor 3rd & Stark Sts. Office bldg on 4th

St.82,000.00

Blocks Nos. 20 & 37 Wheelers Addition30,000.00

East Portland. Improvements

Hotel on Block 37.

Lot 6 Block 148, City of Portland, Or.....3,500.00

The foregoing is a correct list of the property belonging to the Estate of Ben Holladay decd. so far as the same has come to the knowledge of the Executor.

That none of said property has come to my possession.
That the condition of said property is as follows, to-wit:

The Cornelius Farm

St. Joseph Farm

Polk County Farm

Clatsop Property including the household furniture and other property thereon.

The Willamette S M L Mfg. Co stock. 675 shares

Residence Property embracing Lots Nos. 1 7 & 8 in Block 47 and furniture and contents in the City of Portland.

1278 *The Oregon & California Railroad Co.*

Halsey House—Lot No. 3 blk 62 in the City of Portland,

Clarendon Hotel Property, Lots 3 4 6 7 & 8 in Blk 23, City of Portland.

Fractional Block 22 in the City of Portland.

Blocks Nos. 20 and 37 in Wheeler's Add'n East Portland.

Oregon Transfer Co. stock. 1050 shares.

Portland Street Railway Co. Stock—1200 shares—are held by me under a pledge and mortgage executed by Ben Holladay in his lifetime, which mortgage is now in judgment in the Circuit Court of the State of Oregon, for the county of Multnomah.

That by the terms of said judgment, the said Ben Holladay has until the 10th day of July, 1889 within which to redeem said property,

That all of said property is now in the possession and control of George W. Weidler and Joseph Holladay as receivers in said suit.

That the amount due on said judgment and decree is \$346,696.46 with interest thereon at the rate of 6 per cent per annum from the 10th day of July 1886.

That

1. All the shares of the capital stock of the Oregon Real Estate Co being 10,000 in number

2. All the shares of the Willamette Real Estate Company consisting of 5334

3. 31 acres of land near the car shops of the O & C R R in Multnomah County, Oregon.

4. 6 Town lots in the town of Cornelius, in the County of Washington and the St. Joseph Hotel in said town.

5. 3 Blocks in the Town of McMinnville Yamhill County, Oregon.

6. 407 acres of land near the town of Beaverton in Washington County, Oregon.

7. 185 acres of land in Thurston County, Washington Territory

8. \$1388.00 due upon the Stock of W L Halsey in the Willamette Real Estate Company and Lot 6 in Block 148 City of Portland, Or.

Were by deed of Ben Holladay and wife on the 4th day of September 1886 conveyed by them to George W. Weidler in trust for the payment of certain of the conditions of said Holladay in said deed mentioned, and that all of said property is now in the possession of said Trustee under said deed, except 10,000 shares of the Oregon Real Estate Company. That said 10,000 shares were sold by order and decree of the United States Circuit Court for the District of Oregon, at the suit of certain of the creditors of the said Ben Holladay on the 30th day of July 1888 for the sum of \$339,437.48 the amount due the creditors in said trust deed mentioned, and the amount due the said other creditors, parties to said last named suit. That said shares were purchased by one R. Koehler and are held under said sale subject to the right of the Executor of said Ben Holladay, or said Trustee to redeem the same. The Executor's right to redeem said shares expires Jan'y 30th, 1889, and the Trustees right to redeem expires December 30th, 1888.

That no monies, credits or other thing of value has come to the possession of the executor.

1280 *The Oregon & California Railroad Co.*

*In the County Court of the State of Oregon for
Multnomah County.*

In the Matter of the Estate
of

Ben Holladay, Deceased.

I, T. C. Powell, Clerk of County Court of the County of Multnomah do hereby certify that Benjamin Schofield, G N Hale, and Alonza Phillips were duly appointed appraisers of the estate of said deceased situated in Washington County by order of the County Court, duly entered and recorded on the 19th day of May, A D 1890.

Witness my hand and the seal of said County Court this 19th day of May, 1890.

T. C. POWELL, Clerk

(County Court Seal)

By H C Smith, Deputy Clerk

STATE OF OREGON

County of Washington—ss.

We, Benjamin Scholfield, G N Hale and Alonzo Phillips duly appointed appraisers of the estate of Ben Holladay deceased, being duly sworn, say, and each for himself says, that I will truly, honestly and impartially appraise the property of said estate which shall be exhibited to me, according to the best of my knowledge and ability.

BEN SCHOLFIELD,

G. N. HALE,

ALONZO PHILLIPS.

Subscribed and sworn to before me this 18th day of

July, A D 1890.

(Notarial Seal)

W. N. BARRETT,

Notary Public for Oregon.

STATE OF OREGON,

County of Multnomah—ss.

I, James Steel, Administrator with the will annexed of the estate of Ben Holladay deceased, being duly sworn say, that the annexed inventory, contains a true statement of all the real and personal property of the said deceased which has come to my knowledge and possession, situated in Washington County, Oregon, belonging to the said deceased.

JAMES STEEL,

Subscribed and sworn to before me this 19th day of May, A D 1890.

A. H. TANNER,

(Notarial Seal)

Notary Public for Oregon.

Estate of Ben Holladay, Deceased.

To Ben Scholfield, G N Hale and Alonzo Phillips, Appraisers, Dr.

To compensation for services in appraising said estate—items as follows: One day's service at \$2.00 per day each \$6.00
Necessary disbursements—as follows: Total 6.00
Team hire & Expenses 5.00
Notarial fees 1.50
Total amount of per diem and disbursements. 12.50

STATE OF OREGON,

County of Washington—ss.

We, Benj Scholfield, G N Hale, and Alonzo Phillips,

the appraisers above named, being duly sworn, say, and each for himself says, that the foregoing bill of items is correct and just, and that the services have been duly rendered as therein set forth.

BENJ. SCHOLFIELD,
G N HALE,
ALONZO PHILLIPS.

Subscribed and sworn to before me this 18th day of
July, A D 1890.

(Notarial Seal)

W N BARRETT,
Notary Public for Oregon.

*In the County Court of the State of Oregon,
County of Multnomah.*

Inventory and Appraisement.

In the Matter of the Estate
of

Ben Holalday, Deceased.

Real Estate situated in Washington County, Oregon and particularly described as follows:—Cornelius farm, described as follows, to-wit: commencing at the northwest corner of section eleven, T 1 S R 3 W; thence each one hundred and forty rods; thence south twenty eight and one half rods; thence west one hundred and forty two rods; thence north twenty eight and one half rods to the place of beginning, containing twenty five acres more or less, being a part of the donation land claim of J W Linn and wife, and also the following described piece or parcel of land situate in said Washington County, in the State of Oregon, to-wit: Beginning at a point ten and 37-100 chains east of the Southwest corner of section thirty three T 1 N R 3 W; running

thence north forty five and 69-100 chains; thence east eighty chains; thence south eighty and 01-100 chains; thence west eighty chains; thence north thirty four and 34-100 chains to the place of beginning, containing six hundred and forty and 04-100 acres, and being the donation land claim of B Q Tucker and wife, reserving and excepting however, all the following described tracts, pieces and lots of land, to-wit: A four acre tract conveyed to L. Sloper by deed, date November 21, 1875; a four acre tract conveyed to D L Davis by deed, dated; a tract of three acres conveyed to George De-bord by deed, dated February 16, 1873. Also the right of way and depot grounds of the Oregon Central Railroad Company conveyed to said company by deed dated Januay 10, 1873; also a tract of land of about two acres conveyed to school district No 2, Washington County; Oregon by deed dated January 20, 1873. Also all the following blocks and lots in the town of Cornelius, in said Washington County, according to the recorded plat thereof, to-wit: The whole of blocks Nos. two, nine, forty five and forty six, and lots No. 6, 7. 8. 9. and 10 of block No. 4, Lots No. 1 and 2 of Block No. 1. Lots 1, 2, 3, 4, 5, 6, 7, and 8 of Block No. 6; lots No. 6 7 and 8 in Block No. 10; Lots No. 8 and 9 of Block No. 11; lots No. 9 and 10 of Block No. 12; Lots No. 6 and 7 of block No. 14; lots No. 5, 6, 7, 8, 9 & 10 of block No. 15, the undivided one half Lot No. 1 of block No. 16; lots 1 and 2 of Block No. 17; Lots No. 5, 6, 7, and 8 in Block No. 18; Lots No. 1, 2, 3, 4 and 5 of Block No. 26; Lots No. 1, 2, 3, 4, 5 and 8 of Block 27; Lots No. 1, 2, 3, 4

and 5 of Block No. 28; Lot No. 1 of Block No. 29; Lots No. 3 and 4 Block No. 3; and also all the real estate described in a certain conveyance executed by W. L. Halsey, and Mary E. Halsey, his wife to the Willamette Real Estate Company on the 5th day of December, 1872 and recorded at page 357 of Book I of the records of deeds for Washington County, to which reference is hereby made of a more perfect description thereof.

(Part of J W Linn Don. 25 acres, 20 per acre, App at \$500.00 500.00 13.2 Tucker Don. 524 Acres Appraised at \$21,710.00 Whole Cornelius Farm appraised at\$22,210.00 Also Lots numbers six and seven in Block No. 15, and Lot No. 10, in Block No. 15, and Lots Nbs. 1, 2, and 3 in Block No. 26, in the town of Cornelius, Washington County, Oregon (Tax Roll claims Lots 6 and 7 in 14, 1 Lot 6 in Block 15, claimed by Errick Husby, appraised at 500.00, Lot 7 in Block 15, appraised at 50.00 claimed by other parties. Lot No. 10 in block 15, appraised at \$60. Lots 1, 2, and 3 in block 26 appraised at \$120.

Appraised at \$730.00

Amount carried forward\$22,940.00

Amount brought forward\$22,940.00

Also: Frac. Block No. 4 in Beaverton,

Oregon, App. at\$ 150.00

Block No. 2 in Beaverton, Oregon, App at....\$ 200.00

Block No 5 in Beaverton, Oregon, App. at \$300.00

Block No. 7 in Beaverton, Oregon, Records

shows it sold.

Block No. 8 in Beaverton, Oregon,

Claimed by Al Davis.

Lots 3, 4, 5, 6 in blk 9 in Beaverton, Oregon	\$ 150.00
E 1-2 of block 16 in Beaverton, Oregon, or W 1-2 (Belongs to Ch Oh)	\$ 100.00
Block No. 17 in Beaverton, Oregon,	\$ 200.00
Block 20 in Beaverton, Oregon	\$ 200.00
Block 22 in Beaverton, Oregon	\$ 150.00
Block 23 in Beaverton, Oregon, Claimed by Geo. Left.	
Block 25 in Beaverton, Oregon, Claimed by Milnott & McClung	
Block 26 in Beaverton, Oregon	\$ 100.00
Block 27 in Beaverton, Oregon	\$ 100.00
Block 29 in Beaverton, Oregon	\$ 100.00
Block 30 in Beaverton, Oregon	\$ 100.00
Block 31 in Beaverton, Oregon	\$ 100.00
Block 34 in Beaverton, Oregon	\$ 100.00
Block 36 in Beaverton, Oregon	\$ 100.00
Lettered Block A in Beaverton, Oregon	\$ 100.00
Lettered Block B in Beaverton, Oregon	\$ 200.00
Also Lettered Block C Claimed by G. Davis	\$ 150.00

\$2500.00

Also the parcels of land described as follows, to-wit:
The west half of the northwest quarter and the west
half of the southeast quarter of section nine, T 2 S R 1 W
containing 160 acres, also the southeast quarter of Sec-
tion thirty, T 1 S R 1 W containing 160 acres. Also
commencing at the southeast corner of the George H.
and Margaret Smith donation land claim in Sec. 4 T 1

S R 2 W and running thence north 1 degree west on the east line of said claim 46 46-100 chains to the base line; thence west on said line 18 77-100 chains to Henderson's corner; thence south on Henderson's line 46 46-100 chains to the south line of said claim; thence east on said south line to the place of beginning, containing 87 acres all situate and being in the county of Washington and State of Oregon, appraised at \$1300.00

Also W 1-2 of NE 1-4 and the W 1-2 of SE 1-4 of Sect. 9 in T 2 S R 1 W Will Mer. appraised at \$1280.00
SE 1-4 of Sect. 30 thirty T 1 S R 1 W Will Mer. \$3200.00

\$31,220.00

The estate mentioned in the foregoing inventory is real property.

We, the undersigned duly appointed appraisers of the estate of Ben Holladay, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraise the same at the sums set opposite each item in said inventory set down and amounting in all to the sum of Thirty one thousand two hundred and twenty dollars (\$31,220.00)

Dated July 18, 1890.

BENJ. SCHOLFIELD,
G N HALE,
ALONZO PHILLIPS,

“Endorsed.”

Filed August 12, 1890.

T. C. Powell, Clerk.

*In the County Court of the State of Oregon
for the County of Multnomah*

Inventory and Appraisement

In the Matter of the Estate

of

Ben Holladay, Decd.

I, T. C. Powell, Clerk of the County Court, Multnomah County, do hereby certify that A. E. Borthwick, L. M. Cox and George E. Watkins were duly appointed appraisers of the estate of Ben Holladay, Decd. by order of the said County Court, duly entered and recorded on the 18th day of April, A. D. 1891.

Witness my hand and the seal of said County Court this 18th day of April, 1891.

(County Court Seal)

T. C. POWELL, Clerk.

By. H. C. Smith, Deputy

STATE OF OREGON,

County of Multnomah—ss.

A. E. Borthwick, L. M. Cox and George E. Watkins duly appointed appraisers in the matter of the estate of Ben Holladay, deceased, to appraise the Willamette Real Estate Co. stock owned by said estate being duly sworn, say, and each for himself says, that I will truly honestly and impartially appraise the said property of said estate which shall be exhibitetd to me, according to the best of my knowledge and ability.

A. E. BORTHWICK,

L. M. COX.

Subscribed and sworn to before me this 20th day of April, A. D. 1891.

HIRAM E. MITCHELL,
(Notarial Seal) Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah—ss.

I, James Steel, administrator with the will annexed of the estate of Ben Holladay, deceased, being duly sworn say, that the annexed inventory contains a true statement of all the shares of stock of the Willamette Real Estate Company which has come to my knowledge and possession and which have been ordered appraised.

JAMES STEEL,

Administrator with the will annexed of the Estate of Ben Holladay, deceased.

Subscribed and sworn to before me this 18th day of April, A D 1891.

HIRAM E. MITCHELL,
(Notarial Seal) Notary Public for Oregon.

Estate of Ben Holladay, (Deceased.)

To A. E. Borthwick and L. M. Cox, Appraisers, Dr.

To compensation for services in appraising said estate—items as follows:

1 day's service, at \$4 per day, each\$ 8.00

Necessary disbursements, as follows:

STATE OF OREGON,
County of Multnomah—ss.

A. E. Borthwick and L. M. Cox, the appraisers above named, being duly sworn, say and each for himself says, that the foregoing bill of items is correct and just and that the services have been duly rendered as therein set

forth.

A. E. BORTHWICK,
L. M. COX.

Subscribed and sworn to before me this 20 day of
Apl. A. D. 1891. HIRAM E. MITCHELL,
(Notarial Seal) Notary Public for Oregon.

*In the County Court of the State of Oregon
for the County of Multnomah*

Inventory and Appraisement.

In the Matter of the Estate
of

Ben Holladay, Deceased.

5350 shares of the capital stock of the Willa-
mette Real Estate Company, a corporation,
5329 of which said shares stand in the name
of the administrator on the books of the
Company and are in his possession and one
share of which said stock stands in the
name of A. H. Tanner on the books of the
Company and is held by him for said estate
all of which said 5330 shares of stock be-
long to said estate, Appraised at \$2.35 per
share\$ 12,525.50

We, the undersigned, duly appointed appraisers in the
matter of the estate of Ben Holladay, deceased, to ap-
praise the Willamette Real Estate Co. stock hereby cer-
tify that the stock mentioned in the foregoing inventory
has been exhibited to us, and that we appraise the same
at the sums set opposite each item in said inventory,
set down and amounting in all to the sum of Twelve

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thousand, five hundred and twenty five 50-100 dollars.
(\$12,525.50.)

Dated Apl. 20, 1891.

A. E. BORTHWICK,
L. M. COX, Appraisers.

“Endorsed”

Filed Apr. 22, 1891.

T. C. POWELL, Clerk.
By H. C. Smith, Deputy.

*In the County Court of the State of Oregon
for Multnomah County*

In the Matter of the Estate
of
Ben Holladay.

Supplemental Inventory

Joseph Holladay for a supplemental Inventory says that he has received and has in his possession one shot gun, the property of said estate.

That he has been informed that there is a note for \$500 given by Hutchins to Ben Holladay.

That said Hutchins is not responsible and said note of no value and said note he is informed is outlawed or the statute of limitations has run against it. That said note is in the hands of E. J. Ellis, Esq. of Washington, D. C., who is endeavoring to collect the same for the estate.

That there is also a judgment in the state and City of New York against Jennie Portales, deceased, daughter of Ben Holladay. That he is not informed of the amount of said judgment.

That there is some personal property consisting of jewelry belonging to the estate of said Jennie Portales, and when sold by her executor the amount there will be applied on the indebtedness of said estate which the executor is informed is very large.

STATE OF OREGON

County of Multnomah—ss.

I, Joseph Holladay, being first duly sworn say that the foregoing supplemental Inventory is correct and comprises all the property belonging to said estate coming to my knowledge since the filing of the last inventory herein.

JOSEPH HOLLADAY,

Subscribed and sworn to before me this 16th day of April, 1889.

L. A. McNARY,

(Notarial Seal.)

Notary Public for Oregon.

“Endorsed”

Filed April 19, 1909,

E. C. WHEELER,

Clerk of the County Court.

By T. C. Powell, Deputy.

*In the County Court of the State of Oregon
for the County of Multnomah*

Inventory and Appraisement

In the matter of the Estate of
Ben Holladay, Deceased.

I, T. C. Powell, Clerk of County Court of the County of Multnomah, do hereby certify that Joseph Block, C. G. Rowell and W. P. Wright were duly appointed appraisers of the estate of Ben Holladay deceased, by or-

der of the County Court, duly entered and recorded on the 18th day of August, A. D. 1890, situated in Polk County, Oregon.

WITNESS my hand and seal of said County Court this 18th day of August, A. D. 1890.

(Co. Court Seal)

T. C. POWELL, Clerk.

ByDeputy Clerk.

STATE OF OREGON,

County of Polk—ss.

Joseph Black, C. G. Rowell, and W. P. Wright, duly appointed appraisers of the estate of Ben Holladay deceased, being duly sworn say, and each for himself says, that I will truly, honestly and impartially appraise the property of said estate which shall be exhibited to me according to the best of my knowledge and ability.

.....

WILLIAM P. WRIGHT

JOSEPH BLACK

C. G. ROWELL,

Subscribed and sworn to before me this 20th day of August, A. D. 1890.

JNO. J. DALY,

(Notarial Seal)

Notary Public for Oregon.

STATE OF OREGON,

County of Multnomah—ss

I, James Steel, Administrator with the will annexed of the estate of Ben Holladay deceased, being duly sworn, say that the annexed inventory contains a true statement of all real and personal property of the said deceased which has come to my knowledge and possession in Polk County, Oregon, and particularly herein below described.

JAMES STEEL,

Subscribed and sworn to before me this 18th day of
August, A. D. 1890.

A. H. TANNER,

(Notarial Seal) Notary Public for State of Oregon.

Estate of Ben Holladay, Deceased.

To Joseph Black, C. G. Rowell, and W. P. Wright,
Appraisers, Dr.

To compensation for services in appraising said es-
tate items as follows:

Each one day's service at \$3 per day each \$ 9.00

Necessary disbursements as follows:

Team and board\$ 8.00

\$ 17.00

WILLIAM P. WRIGHT.

STATE OF OREGON,

County of Polk—ss.

C. G. Rowell, Joseph Black and W. P. Wright, the
appraisers above named, being duly sworn, say, and each
for himself says, that the foregoing bill of items is cor-
rect and just, and that the services have been duly ren-
dered as therein set forth.

JOSEPH BLACK

C. G. ROWELL

WILLIAM P. WRIGHT

Subscribed and sworn to before me this 20th day of
August, A. D. 1890.

JNO. J. DALY,

(Notarial Seal) Notary Public for State of Oregon.

*In the County Court of the State of Oregon
County of Multnomah*

Inventory and Appraisement

In the matter of the Estate of
Ben Holladay, Deceased.

Real Estate.

Polk County farm, particularly described as follows: to-wit: All the Donation land claim of Thomas H. Hunsaker and Jane Hunsaker, his wife, being claim No. 71, notification No. 5061, and containing 640 acres more or less of land; also the northwest quarter of section twenty five in T 6 S R 7 W of Willamette Meridian; also fifty one acres of land off the west end of the northwest quarter of section thirty, in T 6 S R 6 W; also a tract of land beginning at a post on the northern boundary of the land claim of Jacob Doran, and running thence west 80 chains; thence north 40 chains; thence east 80 chains; thence south 40 chains to the place of beginning, containing three hundred and twenty acres of land, situate in section 26 T 6 S R 7 W of Willamette Meridian, all of said land being situate in Polk County, in the State of Oregon.

The Donation Land Claim of Thomas H. Hunsaker, and Jane Hunsaker, his wife, being claim No. 71 Not. 5061 and containing 640 acres. Value \$15 per acres. \$9600.00.

The NW 1-4 of Sec 25 Tp 6 S R 7 West of the Willamette Meridian. Value \$5 per acre. \$800.00.

Fifty one (51) acres off the West end of the NW 1-4

of Sec No. 30 Tp. 6 S R 6 West Will. Mer. Value \$6 per acre; \$306.00.

A tract of land beginning at a post on the Northern boundary of the land claim of Jacob Doran, running thence west 80 chs. thence North 40 chs. thence East 80 chs. thence South 40 chs .to place of beginning containing 320 acres in Sec. 26 Tp 6 S R 7 West. Value \$1600.00

\$12,306.00

The estate mentioned in the foregoing inventory is the property of the estate of Ben Holladay, deceased.

We, the undersigned, duly appointed appraisers of the estate of Ben Holladay deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraise the same at the sums set opposite each item in said inventory set down, and amounting in all to the sum of Twelve thousand three hundred and six dollars (\$12,306.00.)

Dated Dallas, Aug. 20, 1890.

WILLIAM P. WRIGHT

C. G. ROWELL

JOSEPH BLACK,

“Endorsed” Filed August 29, 1890.

T. C. POWELL,

Clerk of the County Court.

By H. C. Smith, Deputy.

BE IT REMEMBERED, That at a regular term of the County Court of the State of Oregon, for the County of Multnomah, begun and held at the County

Court House in the City of Portland, in said County and State, on Tuesday, the 4 day of Sept. A. D. 1900 the same being the first Tuesday in said month, and the time fixed by law for holding a regular term of said Court.

Present: Hon. W. M. Cake, Judge, Presiding.

WHEREUPON, on this Monday, the 10th day of Sept. A. D. 1900 the same being the 6th Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

In the Matter of the Estate of
Ben Holladay, Deceased.

Now at this time comes on regularly to be heard the final account and report of James Steel, as administrator with the will annexed of the estate of Ben Holladay deceased, heretofore rendered and filed in this Court, this being the time and place fixed for the hearing and settlement of the same, and it appearing to the Court that due notice of the filing of said account and of the time and place of hearing the same has been given in all respects as required by law and the order of this court, and that due proof of the publication of such notice has been duly made and filed herein and that no exception or objections in writing or otherwise to said account, have been taken or made or filed herein, And further appearing to the court that there are no funds in the hands of said administrator, after the allowance and payment of his commission allowed by law, to pay any further dividends upon the claims presented herein within the first six months from the date of the notice

to creditors, or to pay any part of the debts or claims against said estate not presented within said six months, or to pay any of the remaining expenses of the administration of said estate; that said estate has been fully, fairly and justly administered and is in a proper condition to be closed, and that said final account is a just, true and correct statement of the amount of money and property accounted for by said administrator and of the amounts disbursed by him, and that vouchers have been duly filed herein with the several semi-annual accounts and reports of said administrator showing said disbursements in all respects as required by law; and that said administrator has duly and properly accounted for all money and property coming into his hands as such administrator, and no good reason appearing or being shown to the Court why said final account should not be settled and allowed.

Now, therefore, it is ordered, adjudged and decreed that the administration of said estate be closed, and that said final account of said administrator heretofore filed herein be and the same is hereby fully and in all respects allowed, approved and confirmed. And it is further

Ordered, adjudged and decreed that said administrator be and he is hereby fully and finally discharged from his trust as such administrator, and that the sureties on his official bond be and they are hereby discharged from all liability as such sureties.

W. M. CAKE, Judge.

STATE OF OREGON,
County of Multnomah—ss.

No. 6967.

I, F. S. Shields, County Clerk and Clerk of the County Court of the County of Multnomah and State of Oregon, do hereby certify that the foregoing copy of Petition, Will, Order admitting will, Inventories and order of discharge in the Matter of the Estate of Ben Holladay, deceased, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Petition etc. as the same appears on file and of record in my office and in my custody.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of Sept. A. D. 1911.

F. S. FIELDS,

(SEAL)

County Clerk.

Filed Feb. 13, 1912. A. M. Cannon. Clerk U. S. Court.

[Complainant's Exhibit 26.]

This Indenture Made and entered into at Salem in the County of Marion and State of Oregon, this twenty ninth (29) day of March, A .D., one thousand eight hundred and seventy (1870), between the Oregon Central Railroad Company a body corporate incorporated at the City of Salem in the County of Marion and State of Oregon, on the (22) twenty second day of April, A. D., one thousand eight hundred and sixty seven (1867) under and by virtue of the general incorporation law of the State of Oregon,

approved October A. D., One thousand eight hundred and sixty two entitled an act providing for private incorporations and the appropriation of private property therefor and amendments thereto party of the first part and the Oregon and California Railroad Company a body corporate incorporated and organized at the City of Portland in the County of Multnomah and State of Oregon, on the seventeenth (17) day of March, A. D., one thousand eight hundred and seventy (1870) under and by virtue of the general incorporation law of the State of Oregon aforesaid and amendments aforesaid party of the second part;

Witnesseth, Whereas, the Oregon Central Rail Road Company party of the first part herein was on the 20th day of October, A. D., one thousand eight hundred and sixty eight (1868) duly designated by the State of Oregon by a joint resolution thereof as the corporation to take, manage and receive the benefits of an act of Congress making a grant of lands to aid in the construction of a railroad and telegraph line from Portland in Oregon to the central Pacific Railroad in California entitled an act granting land to aid in the construction of a rail road and telegraph line from the Central Pacific Rail Road in California to Portland, Oregon, approved July 25th, A. D., one thousand eight hundred and sixty six, 1866, and whereas, the said Oregon Central Railroad Company, party of the first part herein did afterwards and in pursuance of the act of Congress aforesaid and of

acts amendatory thereof and supplemental thereto, duly file its assent in writing to the said act of Congress and all the provisions thereof in the office of and with the Secretary of the Interior of the United States of America at Washington City, District of Columbia and the said corporation Oregon Central Railroad Company, of Salem, Oregon, party of the first part herein was recognized by the department of the interior as the corporation in Oregon entitled to take and manage the congressional grant herein before referred to and receive the benefits thereof and whereas, the said Oregon Central Railroad Company party of the first part herein did afterwards proceed to locate the line of said Rail Road and did locate the same for a long distance and did prepare and file its maps in the office of the secretary of the Interior, in strict accordance with all the requirements of said acts of Congress of July 25th, 1866, and amendments thereto aforesaid making such grant of lands and did prior to the (25) twenty fifth day of December, A. D., one thousand eight hundred and sixty nine (1869) fully and in all respects as required by said Act of Congress and acts amendatory thereof and supplemental thereto complete, the construction of twenty miles of its railroad and telegraph, to-wit:

Commencing at East Portland in Multnomah County, in State of Oregon, and running thence in a southerly direction twenty miles and over and did stock and equip the same in all respects as required by said act of Congress and whereas subsequently to

said December 24th, A. D., 1869, the Commissioners appointed by the President of the United States under the power vested in him by said Act of Congress of July 25th, 1866, aforesaid to examine and report upon the Railroad and telegraph line aforesaid being built by said Oregon Central Railroad Company party of the first part herein namely, E. R. Geary, Thos. A. Savier, and James H. Fisk did examine the said twenty miles of railroad and telegraph line and did make their report thereon to the government of the United States, as required by said Act of Congress aforesaid approved July 25th, 1866, making such land grant and the acts amendatory thereof and supplementary thereto which report was favorable and the same was received and accepted by the Government of the United States and the said twenty miles of rail road and telegraph line so completed and equipped as aforesaid were accepted by the secretary of the Interior of the United States and the lands granted by the acts aforesaid and to which the Oregon Central Railroad Company, party of the first part herein was entitled by virtue of the acts of Congress aforesaid and the completion and acceptance of twenty miles of its road, were by order of the Secretary of the Interior withdrawn from sale and private entry and for the benefit of said Oregon Central Railroad Company party of the first herein, its successors and assigns as in and by said acts of congress aforesaid is provided, and whereas, said Oregon Central Railroad Company of the first part herein have done

large amounts of work toward the construction of its road and in addition to said twenty miles so completed as aforesaid in locating and grading the tract for the same, and has acquired divers personal property rights of way, franchises, privileges, credits and interests real and personal and mixed—both legal and equitable absolute and contingent and, Whereas, the Oregon and California Railroad Company, party of the second part herein was incorporated and organized solely with a view of becoming the assignee of all the property rights and franchises and privileges of the Oregon Central Railroad Company for reasons appearing in the subsequent recitals of this conveyance and for the purpose of carrying out to successful completion the railroad and telegraph line commenced and partly completed as aforesaid which Oregon and California Railroad Company, is incorporated and organized in strict accordance with and special reference to a full and complete compliance with said act of Congress aforesaid approved July 25", 1866, and acts amendatory thereof and supplemental thereto as will more fully appear reference being had to the articles of incorporation of such Oregon and California Railroad Company, party of the second part herein filed in the office of the Secretary of State of the State of Oregon on the (17") seventeenth day of March, A. D. 1870, and there remaining of record and made part of this conveyance and Whereas, the board of directors of the Oregon Central Railroad Company party of the first part herein did on the 28", day of

March, A. D. one thousand eight hundred and seventy (1870) at their office in the City of Salem, State of Oregon, at a meeting of such board duly and legally called unanimously adopt the following resolution, that is to say, Whereas, the following communication has this day been received by this company from the Oregon and California Railroad Company, a corporation incorporated and organized at Portland, Oregon, March 17th, 1870 for the purpose of constructing a raliroad and telegraph line from Portland, Oregon southerly through the Willamette, Umpqua, and Rogue River valleys to the south boundary of Oregon in accordance with an Act of Congress approved July 25", A. D., 1866, granting lands for such purpose and amendments thereto, to wit:

Office of Oregon and California Railroad Company.

Portland, Oregon, March 28th, 1870.

To the President of the Board of directors of the Oregon Central Railroad Company, of Salem, Oregon:
Gentlemen:

I respectfully beg leave to submit for your consideration the following proposition from the Oregon & California Railroad Company which I do in the form of the following resolution of the Board of Directors of that corporation passed March 26", A. D., 1870, at the office of their Company in Portland, to-wit:

Resolved that the President of this Company be and he is hereby authorized and instructed to enter into negotiations with the Oregon Central Railroad

Company of Salem, Oregon, incorporated April 22d, 1867, for the purchase of this company of the railroad of such corporation now partly completed and in progress of construction including all the rolling stock and other property connected therewith and including also all the property, real, personal and mixed now owned by such Oregon Central Railroad or to which it may in any wise be entitled and including also all franchises of the said corporation, which it now owns or to which it is or may be entitled by virtue of any act or resolution of congress or of the Legislature of the State of Oregon or in any way or manner and for such purpose the President of this Company is further authorized to agree in writing in the name of this corporation and under its seal for such purchase by and transfer to this company of all such property rights and franchises upon the following terms, to wit: That in consideration of such conveyance transfer and delivery to this company it shall agree to and with its directors and stock holders to assume and shall assume and agree to pay all the debts and liabilities of such Oregon Central Railroad Company as the same mature and become due and payable of whatever name and nature and this company shall also indemnify and forever keep harmless the said Oregon Central Railroad Company from any and all such payments and from all liability whatever of every name and nature for which said Oregon Central Railroad Company may be liable at the date of the acceptance of these propositions.

To the propositions contained in the foregoing resolution an early answer is desired.

Very respectfully,

BEN HOLLADAY,

President of Oregon & California Railroad Company.

And whereas, this company is today indebted in a large amount to wit, in a sum not less than eight hundred thousand (\$800,000.00) dollars nor more than one million (\$1,000,000.00) dollars in gold coin of the United States and which former sum is equivalent in value under existing circumstances to that of all the property and franchises owned or possessed by this company or to which it is in anywise entitled. And whereas there has heretofore existed divers controversies in the courts and there is one suit still pending of a similar nature wherein the right of this company, to use its corporate name, has been and is questioned by another company and by reason whereof the securities of this company have been weakened and rendered comparatively valueless; and which have prevented this company and its contractors from negotiating the same; and from proceedings with the construction of its Rail Road and which have resulted in this Company being driven to a cancellation of its contracts for the construction thereof. Therefore Resolved that it is the judgment of this board that it is for the best interests of this company and all its stockholders to accept the proposition embodied in the foregoing communication.

Resolved, That this company do (subject however to approval by a majority vote of the stock of the corporation) accept the foregoing proposition of the Oregon and California Railroad Company. Resolved that the president and secretary of this company be and they are hereby authorized and directed to enter into an agreement in writing in the name of this company with said Oregon and California Rail Road Company for a sale of all the property and franchises of this corporation upon the terms embodied in the foregoing proposition, which agreement shall however be subject to the approval or disapproval of a vote of the majority of the stock in this company at a stockholders meeting hereafter to be held and, Whereas, in pursuance of such last named resolution of the board of directors of the Oregon Central Railroad Company party of the first part herein an agreement in writing was entered into between the Oregon Central Railroad Company party of the first part herein and the Oregon and California Railroad Company party of the second part herein which agreement bears date March 28", A. D. one thousand eight hundred and seventy (1870) and of which the following is a literal copy, to wit: Articles of Agreement made and entered into this 28", day of March, A. D. 1870, between the Oregon Central Railroad Company a corporation incorporated at Salem on the 22d, day of April, A. D. 1867, under the general incorporation law of the State of Oregon and amendments thereto party of the first part and the Oregon and

California Railroad Company a corporation incorporated at Portland, Oregon, on the 17th, day of March, A. D., 1870, under the laws of Oregon aforesaid party of the second part. Whereas the party of the first part herein is the owner of the Oregon Central Railroad partly completed and in course of construction and rolling stock and other valuable property and franchises including all the rights, privileges, benefits, franchises, and immunities, granted and conferred on the Oregon Company by an Act approved July 25", 1866, entitled an act granting lands to aid in the construction of a Rail Road and telegraph line from the Central Pacific Railroad in California to Portland in Oregon approved July 25", A. D. 1866, and amendments thereto and whereas said Oregon Central Railroad Company party of the first part herein is legally indebted to divers persons but principally to Ben Holladay & Company in an amount not less than eight hundred thousand (\$800,000.00) dollars nor more than one million (\$1,000,000.00) dollars the exact amount of which is to be hereafter ascertained and whereas it has been agreed as will more fully appear by the following communication and proposition presented to the Oregon Central Railroad Company party of the first part herein by the Oregon and California Railroad Company party of the second part herein and the resolution of the board of directors of the said Oregon Central Railroad Company party of the first part in answer thereto that the said Oregon Central Railroad Company party of the first

part shall sell and convey unto said Oregon and California Railroad Company party of the second part all of the railroad and other property both real and personal and all the rights, franchises, privileges, and property of whatsoever of every name, nature, and character in consideration of an agreement upon the part of the Oregon and California Railroad Company to assume and pay as they may mature and become due all the debts and liabilities of every name and nature of the said Oregon Central Railroad Company and the further agreement to forever save, indemnify and keep harmless the said Oregon Central Rail Road Company and its stockholders and directors from all such debts and liabilities which communication and proposition so made as aforesaid are as follows:

Office of Oregon and California Railroad Company.

Portland, Oregon, March 28", 1870.

To the President and Board of Directors of the Oregon Central Railroad Company of Salem, Oregon.

Gentlemen:

I respectfully beg leave to submit for your consideration the following proposition from the Oregon and California Railroad Company which I do in the form of the following resolution of the Board of Directors of that corporation passed March 26", A. D. 1870, at the office of their company in Portland, Oregon, to wit:

Resolved that the president of this company be and he is hereby authorized and instructed to enter into

negotiations with the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22d, 1867, for the purchase by this company of the railroad of such corporation, now partly completed and in progress of construction including all its rolling stock and other property connected therewith and including also all the property real, personal and mixed now owned by such Oregon Central Railroad Company or to which it may in any wise be entitled and including also all franchises of the said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or of the legislature of the State of Oregon; or in any other way or manner and for such purpose the president of this company is further authorized to agree in writing in the name of this proposition and under its seal for such purchase by and transfer to this company of all such property, rights and franchises upon the following terms, to wit: That in consideration of such conveyance transfer and delivery to this company it shall agree to and with said Oregon Central Railroad Company, and to and with its directors and stockholders to assume and shall assume and agree to pay all the liabilities of such Oregon Central Railroad Company as the same mature and become due and payable of whatsoever name and nature and this company shall also indemnify save and keep harmless the said Oregon Central Railroad Company from any and all such payments and from all liability whatever of every name and nature for which said Oregon Cen-

tral Railroad Company may be liable at the date of the acceptance of these propositions and whereas in response to the foregoing communication the said Oregon Central Railroad Company did on the 28th day of March, A. D., 1870, by the board of directors adopt the following resolution to wit: Whereas the following communication has been this day received by this company from the Oregon and California Railroad Company a corporation incorporated and organized at Portland, Oregon, March 17th, 1870, for the purpose of constructing a railroad and telegraph line from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys to the south boundarys of Oregon in accordance with an act of congress approved July 25th, A. D. 1866, granting lands for such purpose and amendments thereto to-wit:

Office of Oregon and California Railroad Company.
Portland, Oregon, March 28th, 1870.

To the President and Board of Directors of the Oregon Central Railroad Company.

Gentlemen:

I respectfully beg leave to submit to your consideration the following proposition from the Oregon and California Railroad Company, which I do in the form of the following resolution of the Board of Directors of that corporation passed March 26th, A. D. 1870 at the office of their company in Portland, to wit:

Resolved that the president of this company be and he is hereby authorized and instructed to enter into

negotiations with the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22d, 1867, for the purchase by this company of the railroad of such corporation now partly completed and in progress of construction including all the rolling stock and other property connected therewith and including also all the property real personal and mixed now owned by such Oregon Central Rail Road Company or to which it may in anywise be entitled and including also all franchises of said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or of the Legislature of the State of Oregon or in any way or manner and for such purpose the President of this company is further authorized to agree in writing in the name of this corporation and under its seal for such purchase by and transfer to this company of all such property, rights, and franchises upon the following terms, to wit: That in consideration of such conveyance transfer and delivery to this company it shall agree to and with said Oregon Central Railroad Company and with its directors and stockholders to assume and shall assume and agree to pay all the debts and liabilities of such Oregon Central Rail Road Company, as they mature and become due and payable of whatever name and nature and this company shall also indemnify and forever keep harmless the said Oregon Central Railroad company, from any and all such payments and from all liability whatever of every name and nature for which said Oregon Cen-

tral Railroad Company may be liable at the date of the acceptance of these propositions, To the propositions contained in the foregoing resolutions an early answer is desired.

Very respectfully,

Sd. BEN HOLLADAY,

President of Oregon and California Railroad Company.

And whereas this company is to day indebted in a large amount to wit, in a sum not less than eight hundred thousand (\$800,000.00) dollars nor more than one million (\$1,000,000.00) dollars in gold coin of the United States and which former sum is equivalent in value under existing circumstances to that of all the property and franchises, owned or possessed by this company or to which it is in anywise entitled and Whereas, there has heretofore existed divers controversies in the courts and there is one suit still pending of a similar nature wherein the right of this company to use its corporate name has been and is questioned by another Company and by reason whereof the securities of this Company have been weakened and rendered comparatively valueless and which have prevented this Company and its contractors from negotiating the same and from proceeding with the construction of its Railroad and which have resulted in this company being driven to a cancellation of its contracts for the construction thereof. Therefore resolved that it is the judgment of this board that it is for the best interests of this company and all

its stock holders to accept the proposition embodied in the foregoing communication. Resolved that this company do (subject however to approval by a majority vote of the stock of this corporation) accept the foregoing proposition of the Oregon and California Railroad Company. Resolved that the President and secretary of this Company **be and they are hereby** authorized and directed to enter into an agreement in writing in the name of this company with said Oregon and California Railroad Company for a sale of all the property and franchises of this corporation upon the terms embodied in the foregoing propositions which agreement shall however be subject to the approval or disapproval of a vote of the majority of the stock in this company at a stock holders meeting hereinafter to be held.

Therefore in consideration of the premises and of the valuable considerations moving from one to the other as hereinbefore stated.

The said Oregon Central Railroad Company party of the first part does hereby sell and agree to convey within one week from this date to the Oregon and California Railroad Company, party of the second part therein, the whole of the Oregon Central Railroad and telegraph line and all the rolling stock of such road and also all property both real, personal and mixed now owned by the Oregon Central Railroad Company of whatever name and nature and all the rights of way, privileges, franchises and interest whatever both legal and equitable which the said

corporation party of the first part herein now has or owns and especially all the land rights, franchises, privileges, emoluments, and benefits whatever which the Oregon Central Railroad Company party of the first part herein now has or owns or to which it is or may be entitled either legal or equitable by virtue of the acts of congress aforesaid or either or any of them or of any other act of Congress or of any act or resolution of the Legislature of the State of Oregon or of the decision of any of the Federal or State department or of the federal or state courts.

In consideration whereof the said Oregon and California rail road company party of the second part hereby covenants and agrees to and with said Oregon Central Rail Road Company, party of the first part to assume and agree to pay and it does hereby assume and agree to pay to whomsoever owing or may hereafter be due or owing whenever the same becomes due and payable all of the debts obligations and liabilities whatsoever of the said Oregon Central Railroad Company of whatsoever name, nature or amount and in the gold coin of the United States and the Oregon and California Railroad Company does further hereby covenant and agree to and with the Oregon Central Railroad Company party of the first part to indemnify and forever save and keep harmless the said Oregon Central Railroad Company against the payment at any time hereafter of any claims demand or demands that now exist or which may at any time hereafter arise or come against such

last named corporation and against all loss, expense disbursements and damages whatsoever which the party of the first part may at any time hereafter be called upon to incur or pay by reason of any such claim or demand.

In Testimony Whereof, the parties hereto the Oregon Central Rail Road Company party of the first part by and through its President I. R. Moores and Geo. E. Cole, its secretary and the Oregon and California Railroad Company party of the second part by and through its President Ben Holladay and its secretary A. G. Cunningham, all of such officers being hereunto duly authorized and empowered as aforesaid have each caused their names together with the signatures of the said officers respectively to be hereto subscribed and their corporate seals attached the 28th day of March, A. D. 1870.

Seal

O. C. R. R. Co.

Seal

O. & C. R. R. Co.

OREGON CENTRAL RAILROAD COMPANY,

(Signed) By I. R. Moores,

President.

OREGON CENTRAL RAILROAD COMPANY,

(Signed) By Geo. E. Cole,

Secretary.

OREGON AND CALIFORNIA RAIL ROAD
COMPANY,

(Signed) By Ben Holladay,
President.

OREGON AND CALIFORNIA RAIL ROAD
COMPANY,

(Signed) By A. G. Cunningham,
Secretary.

And Whereas, In pursuance of such resolution aforesaid of the Board of directors of the Oregon Central Railroad Company, party of the first part herein and of the said contract and agreement aforesaid entered into between the said Oregon Central Railroad Company party of the first part herein and the said Oregon and California Railroad Company party of the second part herein and in affirmance of such resolution and such contract the stockholders of the Oregon Central Rail Road Company party of the first part herein did by a vote of over two thirds of the whole capital stock of such corporation at a meeting of such stockholders duly and legally called for such purpose and held at office of such company in Salem, State of Oregon on Monday March (28) twenty eighth, A. D., 1870, at 7 o'clock P. M. unanimously adopted the following resolution to wit:

Whereas the directors of this corporation did at a meeting of their board regularly called for such purpose and held at the office of the Company in Salem, Oregon, on the 14th day of March, A. D., 1870 by a unanimous vote adopt the following resolutions:

Resolved that a meeting of the stockholders of the Oregon Central Rail Road Company of Salem, Ore-

gon, be and the same is hereby called to be held at the office of the company in Salem, Oregon, on Monday the 28th day of March, A. D., 1870, at seven (7) o'clock P. M. for the purpose of considering the propriety of and authorizing the dissolution of such corporation, the settling of its business, disposing of its property, and the division of its capital stock; Resolved that the secretary of this company be and he is hereby authorized and directed to give notice of such meeting and of the purpose thereof by publication of the same ten days in the following daily newspapers, to wit: The Daily Oregonian and the Daily Herrald published at Portland, Oregon, and the Daily Statesman published at Salem, Oregon, and whereas in pursuance of such order of the board of directors the following notice was duly published as prescribed by such board of directors by the secretary of this corporation for the period of ten days in each of the following newspapers to wit, The Daily Oregonian and the Daily Herald of Portland, Oregon, and the Daily Statesman of Salem, Oregon. Notice to stockholders of the Oregon Central Railroad Company of Salem, Oregon, at a regular meeting of the board of directors of the Oregon Central Railroad Company of Salem, Oregon, on the 14th day of March, A. D., 1870, the following resolution was unanimously adopted to wit:

Resolved that a meeting of the stockholders of the Oregon Central Railroad Company of Salem, Oregon, be and the same is hereby called to be held at the

office of the company in Salem, Oregon, on Monday the 28th day of March, A. D. 1870, at (7) seven o'clock P. M. for the purpose of determining the propriety of and authorizing the dissolution of such corporation, the settling of its business, disposing of its property and the division of its capital stock. Therefore all stockholders in the Oregon Central Railroad Company of Salem, Oregon, are hereby notified and requested to appear at the office of such company in Salem, Oregon, on Monday the 28th day of March, A. D. 1870, at seven (7) o'clock P. M. for the purpose of attending to the transaction of the business specified in the foregoing resolution.

Recorder of Board of Directors,

(Signed) I. R. MOORES,

President of Oregon Central Railroad Company.

Geo. E. Cole, Secretary.

And whereas, in pursuance of such call of the board of directors, and such notice there are now here present the following named stockholders in this corporation. Each holding owning and representing the number of shares of stock in this corporation as hereinafter specified and constituting in all more than two thirds of the whole capitol stock of this corporation to wit. Ben Holladay and Company the owners and holders of sixty four thousand six hundred and sixty one (64,661) shares of such stock. That is to say fourteen thousand five hundred (14,500) shares of the preferred interest bearing stock and 50,161 shares of the Common stock and J. H. Douthitt the owner

and holder of one share and each of the following named stockholders each of whom owns and represents one share that is to say J. H. Moores, I. R. Moores, E. P. Cook, A. L. Lovejoy, Geo. L. Woods, John F. Miller, Geo. W. Weidler, A. Bush, J| C. Hawthorne, George E. Cole, Jacob Cansor, J. H. Foster, and whereas a corporation has been duly incorporated and organized under the general incorporation law of this state and the amendments thereto for the purpose of constructing and operating a railroad and telegraph line from Portland, Oregon, southerly through the Willamett, Umpqua and Rogue River Valleys to the California line on the southern boundary of Oregon, which corporation has been organized by stockholders herein representing and controlling over two thirds of the whole capitol stock hereof and for the sole purpose of carrying out to successful completion the enterprise for which this corporation was originally formed, the reason for the formation of such new corporation being to avoid the embarrassment and impediments constantly being thrown in the way of this enterprise by certain persons who claim falsely to be a corporation under the laws of Oregon under the name of the Oregon Central Railroad Company and who have heretofore disputed and are still disputing the right of this corporation to use such name and although such claim upon the part of such alleged corporation is and ever has been been, illegal, inequitable, unjust, and based upon a gross fraud; and although such alleged corporation has

heretoforee uniformly failed in its attempts in court to restrain by legal process our use of such name; and while we believe that all future attempts will be met by like results; yet we are conscious of the fact that such persons who claim to be such corporation have not only the disposition but the power by vexations, actions and suits in divers courts wherein the right to use our corporate name may be questioned to annoy and harrass this corporation and embarrass its operations impede the constructions of its enterprise, weaken and cloud its securities and injure its credit and whereas, in consideration of the premises, it is deemed advisable by the stock holders hereinbefore mentioned and all now present do dissolve this corporation and settle up its business and sell, dispose of, assign, transfer and convey unto the said Oregon and California Railroad Company; such being the name of the corporation so formed as aforesaid, all the property, real personal and mixed and all the franchises, rights, credits, privileges and emoluments of whatsoever name and nature owned by or in anywise belonging to this corporation as per terms of a written agreement between the two corporations for such purpose dated the 28th day of March, A. D., 1870, therefore,

Resolved that the Oregon Central Rail Road Company of Salem, Oregon, incorporated April 22d, 1867, be and the same is hereby dissolved to take effect upon the settlement of its business and the sole transfer and conveyance of its property and franchises as hereinafter specified.

Resolved that the President and secretary of this corporation be, and they are hereby authorized and empowered and directed to immediately and as soon as practicable settle all the business of this corporation and whereas, this corporation has in and for the consideration of the written covenants and agreements upon the part of the Oregon and California Rail Road Company to pay all the debts, demands and liabilities of this company, of every name and nature, as the same mature or become due, and in and for the further consideration of the covenants of such corporation to forever save and indemnify and keep harmless this company from all claims and demands whatsoever bargained and sold to such Oregon and California Railroad Company all the property real and personal rights and franchises, credits and interests, legal and equitable, determined, absolute and contingent of every name and nature now owned by or belonging to this corporation therefore,

Resolver further, that the written contract heretofore entered into between this company and the said Oregon and California Rail Road Company for the sale and transfer of all of the property of this company to such corporation be and the same is hereby ratified and confirmed and that I. R. Moores present President of this corporation and Geo. E. Cole, present Secretary thereof, in consideration of the covenants and agreements aforesaid, on the part of said Oregon & California Rail Road Company to pay all the debts and liabilities of this company of every

name and nature be and they are hereby authorized, empowered and directed for this corporation and its corporate name and as its president and secretary and under its corporate seal and for the use and benefit of its stockholders, to sell, assign, transfer, set over, convey and deliver to the said Oregon and California Railroad company of Portland, Ore. All the property, real, personal and mixed of whatever name and nature both legal and equitable absolute and contingent and all donations, rights, credits, accounts, and interests whatever now owned by or in any wise belonging to this corporation, and all franchises and interests whatever by its possessed or owned and especially to sell, assign, transfer, set over and convey in the name of this corporation, to wit, The Oregon Central Railroad Company and under its corporate seal unto the said Oregon and California Railroad Company of Portland, Oregon, its successors and assigns all the lands rights titles franchises, interests, claim, property and demand whatsoever both legal and equitable present and prospective absolute and contingent which this corporation the Oregon Central Rail Road Company; of Salem, Oregon, now has owns or possesses or to which it is now of right entitled either legal or equitable or to which it may at any time hereafter become entitled in and to the franchise and grant of lands made by the congress of the United States to aid in the construction of a railroad and telegraph line from the Central Railroad in California to Portland in Oregon by an Act entitled An

Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Rail Road in California to Portland in Oregon, approved July 25", A. D. 1866, and the amendments thereto. This corporation having been duly designated by the Legislature of Oregon in pursuance of the requirements of such acts of Congress, with full power and authority to include in such sale, assignment, transfer and conveyance all right, title and interest of every name and nature which this corporation now has or to which it is either legally or equitably entitled or at any time hereafter may be either in whole or in part to the ownership management and control of the lands franchises and benefits granted or conferred by such Act of Congress and amendments thereto, and

Whereas the present indebtedness of this company exceeds the sum of eight hundred thousand (\$800,000.00|100) dollars in U. S. gold coin the whole of which amount said Oregon and California Rail Road Company have assumed and agree to pay and to forever save indemnify and keep harmless this company against all liability and damages by reason thereof in consideration of this transfer and sale to said corporation of all the property and corporate franchises of this corporation and,

Whereas it is the judgment of this meeting that the assumption of such indebtedness is a full complete and adequate consideration for all the property and corporate rights and franchises of this company here-

by directed to be transferred and conveyed and that the best interests of all the stockholders herein are subserved by the cancellation of such indebtedness and whereas there being no money or property to apportion among the several stockholders of this company after the disposal of its property and the payment of its liabilities as aforesaid and the business of this company being about to suspend therefore, Resolved, that the whole capitol stock of this corporation both preferred interest bearing and common stock be and the same is hereby cancelled and the holders thereof are hereby directed to surrender the certificates thereof to the secretary of this corporation and such secretary is hereby directed to cancel each certificate by writing in red ink across the face of each thereof, these words.

Surrendered and cancelled by order of a resolution of the stock holders; adding thereto the date and his name and title of his office and,

Resolved that from and after the date of the delivery of such conveyance, assignment and transfer to the said Oregon and California Rail Road Company this corporation to wit, The Oregon Central Rail Road Company of Salem shall be dissolved, and

Whereas, the board of directors of the Oregon Central Rail Road Company party of the first part did at a meeting of such board legally called at their office in Salem, Oregon, on the 29th day of March, A. D., 1870, unanimously adopt the following resolution, Resolved that I. R. Moores, President and Geo. E.

Cole Secretary of this Company be and they are hereby authorized and directed to make execute and deliver to the Oregon and California Rail Road Company of Portland, Oregon, in the name of this corporation and under its corporate seal and under their signatures as such President and secretary a good and sufficient deed of conveyance of all the property and franchises of this company of whatever name and nature real personal and mixed and of all its rights, credits and interests whatsoever in accordance with the contract heretofore entered into with such corporation for such sale, assignment transfer and conveyance and in accordance with the resolution of the stockholders of this corporation adopted this 28th day of March, A. D., 1870, affirming such sale and directing such conveyance. Therefore in consideration of the premises and of the assumption on the part of the Oregon and California Railroad Company party of the second part herein of all the debts and liabilities of the Oregon Central Railroad Company party of the first part herein of whatsoever name or nature and of the covenant and agreement upon the part of such Oregon and California Rail Road Company to pay all debts liabilities, claims, damages and demands whatsoever of every name and nature for which the Oregon Central Railroad Company, party of the first part herein is now or at any time hereafter may be made liable and the further covenant to forever save indemnify and hold harmless the said Oregon Central Railroad Company party of

the first part herein and its directors, and stockholders, against all loss, damages and costs, expenses and disbursements by reason of any such claims, liabilities or demands all which agreements and covenants are by the acceptance of this deed of conveyance by said Oregon and California Rail Road Company party of the second part herein by such corporation organized and agreed and in and for the further consideration of the mutual covenants and agreements of the parties hereto as aforesaid, and of the further consideration of the sum of one dollar in hand paid by the said Oregon and California Rail Road Company party of the second part herein to the said Oregon Central Rail Road Company party of the first part and the receipt whereof is hereby acknowledged, the said Oregon Central Rail Road Company party of the first part herein by I. R. Moores its president and Geo. E. Cole, its secretary both being thereto duly authorized and empowered as aforesaid for itself the said Oregon Central Rail Road Company corporation aforesaid and party of the first part herein and for its successors has granted, bargained, sold, aliened, assigned, transferred, set over, enfeofed, conveyed, delivered and confirmed and by these presents it does hereby grant, bargain, sell, alien, assign, transfer, set over, enfeof, convey, deliver and confirm to the Oregon and California Rail Road Company party of the second part herein, and to its successors and assigns all and singular the rail road and telegraph line of the said Oregon Central Rail Road Company party of the first part herein now constructed from a point in the town of East Port-

land in Multnomah County, State of Oregon, opposite the City of Portland, a distance of over twenty miles running southerly to a point in Clackamas County, State of Oregon, together with all and singular the extensions of such railroad of the said party of the first part now in progress of construction north and south from the termini of the said twenty miles completed as aforesaid to-wit, the whole line of the said railroad and right and franchise of the said party of the first part to construct a rail road and telegraph line from Portland in Oregon southerly through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of Oregon on the California line. Together with all its lands, tenements, hereditaments acquired and appropriated whether acquired by purchase, gift, by voluntary conveyance or the judgment or decree of any court of which shall hereafter be acquired or appropriated for the purpose of right of way for a single or double tract rail road and all the appurtenances thereunto belonging.

And also all the lands acquired or which shall hereafter be acquired for depots, engine houses, machine shops, superstructures, erection and fixtures and also all and singular the whole of the property of every name and nature real personal and mixed now owned by the party of the first part herein or to which it has any right, either legal or equitable absolute or contingent and also all and singular the franchises rights and privileges now owned possessed or acquired or to which the said party of the first part has any right or title either legal or equitable absolute or contingent.

And also all the rails, bridges, ways, piers, depots, engine houses, car houses, station houses, warehouses, machine shops, work shops, mills, machinery, engines, tackle, tools, superstructures, fixtures, privileges, franchises and rights of said party of the first part and all the lands, tenements hereditaments and real estate where-soever and whatsoever now owned by said party of the first part or to which it has any right legal or equitable absolute or contingent and all and singular the locomotives, passenger cars, freight cars and all other cars, carriages, tools, machinery, and equipments for said rail road and now owned by said Oregon Central Rail Road Company party of the first part herein.

And also all goods, chattels, horses, mules, carts, drays, oxen, all live stock and all implements of every name and nature heretofore or now used in and about the construction of such railroad and telegraph line and all rolling stock of every kind and description now owned by said party of the first part together with all rents, issues, income, profits, money, rights, benefits and advantages desired or to be desired had or received, therefrom by said party of the first part.

Also all donations and agreements to give pay or transfer to the party of the first part any moneys, lands tenements, or other property with full power and authority to enforce the collection and transfer of the same.

And also and especially all the lands, rights, title, franchises, interest, claim, property, and demand whatsoever both legal and equitable, present and prospective absolute and contingent, which the Oregon Central

Rail Road Company party of the first part herein now has owns or possesses or to which it is now of right entitled legally or equitably or to which it may at any time hereafter become entitled in and to the franchise and grant of lands made by the congress of the United States to aid in the construction of a rail road and telegraph line from the Central Pacific Rail Road in California to Portland in Oregon by an act entitled.

An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Rail Road in California to Portland, Oregon, approved July (25) twenty fifth A. D. one thousand eight hundred and sixty six (1866) and amendments thereto.

And also all the lands included in such grant and all the right ,title, and interest which the party of the first part now has to the same hereby giving, granting and assigning unto said party of the second part all the right, title interest and claim which the party of the first part now has in or to the lands, franchises, property, benefits and emoluments, granted or intended to be granted by virtue of the act of congress aforesaid and the acts amendatory thereof or supplemental thereto.

Also all the right, title and franchise which the party of the first part has for any purpose whatever by virtue of any act or resolution of the Legislature of the State of Oregon or the judgment or decree of any court either State or Federal.

To have and to hold the said premises, franchises and property and every part thereof unto the said Oregon and California Rail Road Company party of the second

part herein its successors and assigns forever.

It Witness Whereof, the said Oregon Central Rail Road Company party of the first part herein has caused its corporate seal to be affixed to these presents and the same to be signed by its President and Secretary by resolution of the Board of Directors thereof and also by resolution of the stockholders thereof at Salem, Marion County, Oregon, this twenty ninth (29th)day of March, in the year of our Lord one thousand eight hundred and seventy (1870)

OREGON CENTRAL RAIL ROAD COMPANY,

By I. R. MOORES, President.

OREGON CENTRAL RAIL ROAD COMPANY

By GEO. E. COLE, Secretary.

Signed, sealed and delivered in presence of:

J. H. Mitchell,

Memory N. Chapman.

(Seal of O. C. R. R. Co.)

U. S. Revenue Stamp eight hundred (\$800.00) dollars cancelled O. C. R. R. Co by Geo. E. Cole Secy. March 29th, 1870.

STATE OF OREGON,

County of Marion—ss.

Be it remembered that on this twenty ninth (29) day of March, A. D. one thousand eight hundred and seventy (1870) before me M. N. Chapman, a Notary Public in and for the State of Oregon for Marion County, duly commissioned and qualified, personally appeared the above named I. R. Moores, President of the Oregon Central Railroad Company and Geo. E. Cole, Secretary of

the Oregon Central Rail Road Company named in the foregoing indenture and whose names are subscribed to the foregoing instrument, both personally known to me to be the individuals described in and who executed the said instrument and they severally acknowledged to me that he the said I. R. Moores as President of the Oregon Central Rail Road Company and he the said Geo. E. Cole as Secretary of the Oregon Central Rail Road Company executed the foregoing conveyance as and for the act and deed of the said Oregon Central Rail Road Company freely and voluntarily and for the uses and purposes therein mentioned, and the said Geo. E. Cole being duly sworn did depose and say that he is the Secretary of the Oregon Central Railroad Company and resides at Portland, Oregon, that he is acquainted with the corporate seal of said company that the said seal affixed to the foregoing conveyance is such genuine corporate seal that he affixed the same as secretary of said company on the twenty ninth day of March A. D. 1870 by order of the board of directors of said company ratified and affirmed by an order of the stockholders thereof and that he signed his name as secretary to said conveyance by like orders.

In Witness Whereof, I have hereunto subscribed my name and affixed my notarial seal the day and year first above written.

MEMORY N. CHAPMAN

(Notarial Seal)

Notary Public

5c U. S. Int. Rev. Stamp Cancelled M. N. C. March
29th, 1870.

Filed for & recorded April 18th, 1870.

J. M. FRAZER, Recorder.

STATE OF OREGON,
County of Clackamas—ss.

I, L. E. Williams, Recorder of Conveyances, of the above named County and State, do hereby certify that the foregoing copy of Deed from Oregon Central R. R. Co. to California & Oregon R. R. Co. as recorded in Book No. H at page No. 1 of deeds has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original Deed as the same appears of record in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed my seal this 18th day of September, 1911.

L. E. WILLIAMS,

(SEAL)

Recorder of Conveyances.

Filed Feb. 13, 1912. A. M. Cannon, Clerk U. S. District Court.

COMPLAINANT'S EXHIBIT 27.

UNITED STATES OF AMERICA .

STATE OF OREGON

Office of the Secretary of State.

I, BEN W. OLCOTT, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify that I have carefully compared the annexed copy of the articles of incorporation of the OREGON AND CALIFORNIA RAILROAD COMPANY with the original articles of incorporation filed in this office on the

17th day of March, A. D., 1870, and find the same to be a full, true and correct transcript therefrom and of the whole thereof, together with all official endorsements thereon; and

I further certify that, under the laws of the State of Oregon, I am the legal custodian of the original articles and have the requisite official knowledge relative thereto.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Oregon.

Done at the Capitol at Salem, Oregon, this 26th day of August, A. D., 1912.

BEN W. OLCOTT,

Secretary of State.

By S. A. Kozar, Deputy.

Deputy.

Articles of Incorporation of the

“Oregon and California Railroad Company”

Know all men by these presents: that we the undersigned corporators, Ben Holladay of New York and Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medorem Crawford, of the State of Oregon, do by these presents associate ourselves together as a corporation and body politic under and by virtue of the General Incorporation law of the State of Oregon approved October 14, A. D., 1862, and amendments thereto and for such purpose we do jointly and severally hereby agree to and with each other to the following Articles

Article First. The name assumed by this corporation and by which it shall be known is the “Oregon and California Rail Road Company.”

Article Second. The duration of this corporation shall be ninety nine years.

Article Third. The enterprise, business, pursuit and occupation in which this corporation proposes to engage, is to construct a Rail Road and Telegraph line with all the necessary branches, side tracks, fixtures, buildings, depots, stations, and appurtenances from Portland in the State of Oregon and running thence southly through The Willammette, Umpqua and Rogue River Valleys to the California line on the southern boundary of Oregon, to connect with the Rail Road and Telegraph line now being constructed northerly through the State of California by the "California and Oregon Rail Road Company" toward the southern boundary of Oregon, and to purchase, own, construct, hold, equip, operate and use all necessary Ferries on the line of such road, over the Willammette and other Rivers and over any river or rivers on either side of the line of such Rail Road which may be necessary or proper in crossing freight and passengers to and from the said Rail Road: To maintain the said Rail Road and Telegraph line in good order, condition and repair and to operate the said Rail Road and employ the same and the said Telegrph line in the business of transporting passengers and freight and the United States mails, and for the purposes aforesaid to purchase, take and receive of and from the "Oregon Central Rail Road Company" of Salem Oregon Incorporated April 23 A. D. 1867 that portion of its Rail Road and Telegraph line now completed together with all the property, real, personal and mixed, and right of way of

such last named corporation of whatsoever name and nature and all its rights and franchises of every name and nature both legal and equitable which the said last named corporation now has or owns or to which it is in any way or manner entitled, or hereafter may be entitled to whether the same is absolute or contingent and particularly and especially all the right, title, interest, franchise claim and demand which the said "Oregon Central Rail Road Company" of Salem Oregon aforesaid now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an Act of Congress entitled "An Act granting lands to aid in the construction of a Rail Road and Telegraph line from the Central Pacific Railroad in California to Portland in Oregon" approved July 25 1866 and of all amendments thereto. The purpose of this Corporation being to make such portion of the Railroad and Telegraph line of said "Oregon Central Railroad Company" which is now completed a part of the line of Rail Road and Telegraph which this corporation proposes to construct as aforesaid from Portland Oregon to the California line, and to construct and equip the whole line thereof from Portland in Oregon to said California line in all respects in accordance with the Act of Congress hereinbefore referred to, and the amendments thereto, and for the purpose of receiving all the benefits of such Act of Congress and amendments thereto intended to be conferred thereby on the Oregon Company and for the purpose of complying with all the provisions of such Act.

Article Fourth. The principal office for the transac-

executed the foregoing Articles of Incorporation freely specified.

Witness my hand and official Seal the day and year in this Certificate first above Written.

Geo. W. Murray,

(NOTARIAL SEAL)

Notary Public.

5c I. R. Stamp Cancelled.

E N D O R S E D

3 7 1 9

Articles of Incorporation
of the

Oregon and California Rail Road Company

In Triplicate

Filed in the office of the Secretary of State, this 17th day of March, A. D. 1870, at 3½ O'clock P. M.

SAMUEL E. MAY,

Secy of State.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. Court.

COMPLAINANT'S EXHIBIT 28

UNITED STATES OF AMERICA

STATE OF OREGON

Office of the Secretary of State.

I, BEN W. OLCOTT, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify that I have carefully compared the annexed copy of the articles of incorporation of the OREGON CENTRAL RAIL ROAD COMPANY with the original articles of incorporation filed in this office on the 22nd day of April, A. D. 1867, and find the same to be a full, true and correct transcript therefrom and of the

whole thereof, together with all official endorsements thereon; and

I further certify that, under the laws of the State of Oregon, I am the legal custodian of the original articles and have the requisite official knowledge relative thereto.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Oregon.

Done at the Capitol at Salem, Oregon, this 27th day of August, A. D., 1912.

BEN W. OLCOTT,
Secretary of State.
By S. A. Kozer, Deputy.
Deputy.

Know all men by these presents that we, J. H. Moores, Geo. L. Woods, S. Ellsworth by Geo. L. Woods, his attorney, I. R. Moores, E. N. Cooke and J. S. Smith, by I. R. Moores, their attorney and Samuel A. Clarke have this day incorporated ourselves under and in accordance with the laws of Oregon and we adopt the following as our articles of Incorporation.

Article First.

This corporation shall be Known as and do business under the name of the Oregon Central Rail Road Company.

Article Second.

The enterprise, occupation and business for which this company incorporates is to construct a rail road with all the necessary branches, fixtures, buildings and appurtenances, from Portland in Oregon, southerly, about

three hundred miles to the California line; to maintain the said road in good condition and repair, and to employ the same in the transportation of passengers and freight.

Article Third.

The principal office for the transaction of the business of the Company shall be kept at the City of Salem, Marion County, Oregon.

Article Fourth.

The Capital Stock of the Oregon Central Railroad Company shall be fixed at Seven Millions two hundred and fifty thousand dollars (\$7,250,000.00).

Article Fifth.

The number of shares of the Capital Stock shall be Seventy-two thousand five hundred (72,500.) and the amount of each share of the stock shall be one hundred dollars (\$100.00).

Article Sixth.

The period of time during which the company shall remain in operation is not limited as to duration.

In testimony of our adoption of the foregoing articles of Incorporation, Witness our hands and seals this the twenty-second day of April, A. D., 1867.

JOHN H. MOORES SEAL

GEO. L. WOODS SEAL

S. ELSWORTH SEAL

By GEO. L. WOODS, ATTY. SEAL

I. R. MOORES SEAL

I. S. SMITH per	
I. R. MOORES, Atty.	SEAL
E. N. COOKE per	
I. R. MOORES Atty.	SEAL
SAML. A. CLARKE	SEAL
	SEAL
	SEAL
	SEAL
	SEAL

(15c in revenue stamps cancelled.)

State of Oregon)
) ss.
 Marion County)

Be it remembered that on this the twenty-second day of April, A. D., 1867, personally came before me a Notary Public in and for said County and State, the within named **I. H. Moores**, Geo. L. Woods, I. R. Moores for himself and also as Attorney in fact for each of the following named persons, J. S. Smith & E. N. Cooke, and S. Ellsworth by Geo. L. Woods his attorney and S. A. Clarke who several acknowledged that they signed the within and foregoing instrument in person, or as attorney, for the uses and purposes therein named.

In witness whereof I have hereunto set my hand and Notarial Seal this the day and year above written.

C. S. Woodworth,
Notary Public.

(NOTARIAL SEAL)

(5c revenue stamp cancelled)

ENDORSED: Articles of Incorporation of
Oregon Central R. R. Co.

Filed in the office of the Secretary of State this 22d
day of April, A. D., 1867.

I. R. MOORES,
Acting Secy. of State.

DISSOLVED

And these articles of incorporation revoked and re-
pealed, in pursuance of the provisions of Chapter 172,
Laws of 1905, by proclamation of the Governor, filed in
the office of the Secretary of State, January 20th, 1906.

F. I. DUNBAR,
Secretary of State.

Filed Feb. 13, 1912.

A. M. CANNON, Clerk U. S. Court.
(Complainant's Ex. 31)

(COPY)

(EXAMND)

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:
CERTIFICATE NO. 693.

WHEREAS, Gardner Elliot, of Clackamas County, Or-
egon, has deposited in the General Land Office of the
United States a CERTIFICATE OF THE REGISTER
OF THE LAND OFFICE at Oregon City, Oregon, where-
by it appears that Full Payment has been made by the
said GARDNER ELLIOT, according to the provisions
of the Act of Congress of the 24th of April, 1820, entitled
“An act making further provision for the sale of the pub-

lie lands," for the North half of the North East quarter of Section thirty-two, in Township one, south, of Range two, east, in the District of lands subject to sale at Oregon City, Oregon, containing eighty acres, according to the official plat of the Survey of the said lands, returned to the GENERAL LAND OFFICE BY THE SURVEYOR GENERAL, which said Tract has been purchased by the said GARDNER ELLIOT.

Now know ye, that the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several acts of CONGRESS in such case made and provided, have given and granted, and by these presents Do Give and Grant, unto the said GARDNER ELLIOT, and to his heirs, the said tract above described; To Have and to Hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said GARDNER ELLIOT, and to his heirs and assigns forever.

IN TESTIMONY WHEREOF, I, ULYSSES S. GRANT, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the Second day of May, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the Ninety-fourth.

BY THE PRESIDENT:

U. S. GRANT.

Bp CHARLES WHITE, Sec'y.

(SEAL)

M. GRANGER, Recorder of the General Land Office.

Recorded, Vol. 1, Page 435.

I, H. F. Higley, Register of the United States Land Office, Portland, Oregon, having in my charge and custody the records of said Land Office, hereby certify that the foregoing is a true and correct copy of the original patent, now on file in this office, in connection with Oregon City (now Portland Land District) cash Entry No. 693, issued to Gardner Elliot.

H. F. HIGBY,
Register.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 32)

LEASE NO. 5-L.

OREGON AND CALIFORNIA LAND COMPANY

LAND DEPARTMENT.

APPLICATION TO LEASE.

April 20, 1908.

The undersigned hereby applies to lease from the OREGON AND CALIFORNIA LAND COMPANY, for GRAZING purposes, from date to December 31, 1908, inclusive, in accordance with the conditions of said Company's leases, the following described land, to wit:

That portion of the tract of land known as "The Ben Holladay Tract," lying North of Milwaukee road in the Southeast quarter of Section 29.

Oregon and California R. R. Co., \$20.00, received May 19, 1908.

C. H. REDDINGTON,
Ass't Treasurer.

Township 1 South, Range 2 East, W. M., containing . . .
acres, in Clackamas County, Oregon, and to pay as rent
therefor the sum of Twenty (\$20.00) Dollars, cash in ad-
vance.

T. I. HICKEY,
Post Office, Lents, Or., R. F. D. No. 1,
County, Multnomah.

Application approved,

CHARLES W. EBERLEIN,

AW Acting Land Agent.

Lease No. 5-L. T. I. Hickey, R. F. D. No. 1, Lents,
Multnomah County, Ore.

Entered in Record of Leases May 19, 1908, H. K.

Compared J. E. A., H. K.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 33)

OREGON & CALIFORNIA RAILROAD COMPANY
Land Department,
8th Floor, Flood Building.

Charles W. Eberlein,
Acting Land Agent.

San Francisco, Cal., January 21, 1908.

Angell & Fisher, received January 23, 1908, Portland,
Oregon. Answered

Messrs. Angell & Fisher,
Fenton Building,
Portland, Oregon.

Dear Sirs:

I am in receipt of your letter of January 18, 1908, enclosing check of W. H. Counsell in the sum of \$25.00 to pay for use during the year of 1907 of that portion of the tract of land known as the Ben Holladay Tract in the SE. $\frac{1}{4}$ of Section 29, Twp. 1 South, Rge. 2 East, W. M., which lies north of the Milwaukee road.

I am glad to have this matter for last year satisfactorily adjusted.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 34)

OREGON & CALIFORNIA RAILROAD COMPANY
Land Department,
8th Floor, Flood Building.

Charles W. Eberlein,
Acting Land Agent.

San Francisco, Cal., January 2, 1908.

Messrs. Angell & Fisher,
Fenton Building,
Portland, Oregon.

Dear Sirs:

Replying to your letter relative to leasing of the Holiday Tract, I wish to advise that there have been two leases during the past year covering different portions of said tract, as follows:

That portion in the SE. $\frac{1}{4}$ of Section 29, Twp. 1 South, Range 2 East, which lies north of the Milwaukee road was leased to W. H. Counsell of Lents, Oregon, for the sum of \$25.00, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Section 32, Twp. 1 South, Rge. 2 East, being part of the Holliday tract lying south of the Milwaukee road, was leased to M. C. Thompson for \$20.00.

Paid to Dec. 31, '07.

The title of these two tracts stands in the name of the Oregon and California Land Company, and this Department will renew both of said leases upon the same terms as last year.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 35)

OREGON & CALIFORNIA RAILROAD COMPANY,
Land Department,
8th Floor Flood Building.

Charles W. Eberlein,
Acting Land Agent.

San Francisco, Cal., November 5, 1907.

Messrs. Angell & Fisher,
Fenton Building,
Portland, Oregon.

Dear Sirs:

I am in receipt of your letter of November 2, 1907, en-

closing reports on the Ben Holladay Tract and New Era Park in pursuance of examination made at suggestion of Mr. Fenton. Please advise whether you have furnished Mr. Fenton with copies of these reports, or if not and you have copies at hand please do so and ask Mr. Fenton to acknowledge receipt of same to me and advise whether the reports cover the necessary facts.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 36.)

OREGON & CALIFORNIA RAILROAD COMPANY,
Land Department,
8th Floor, Flood Building.

Charles W. Eberlein, Acting Land Agent.

San Francisco, Cal., October 10, 1907.

Messrs. Angell & Fisher,
Fenton Building,
Portland, Oregon.

Dear Sirs:

I have received from Mr. Fenton letter of which the following is an excerpt:

"I write to inquire whether or not you have had an abstract of title to these two tracts known as Holladay tract, containing 229.90 acres, in Clackamas County, Oregon, and the other, known as a portion of the Elizabeth Alprey Donation Claim No. 37, containing fourteen acres.

In this connection also I should like to have you direct someone representing your office to make an examination of this property in the field, reporting to you, first, what possession if any has the Oregon and California Railroad Company had of these respective tracts, when such possession had for the first time, has it been continuous, and of what character, stating particularly the nature and kind of improvements, when and by whom made. Second, the character of the land as to whether it is improved or otherwise, timbered or otherwise, and particularly with a view to the uses to which it has been put in the past; what rentals if any received, from whom and to whom paid.

I have had an impression that at one time I called the attention of Mr. Andrews and Mr. Koehler to the Holladay tract, and to the defective title, and suggested that the premises should be fenced so that there might be no question about the statute of limitations commencing to run. I have no record of this transaction, and my memory is all that I have to serve me. It is, however, my impression that the title was found to be in Ben Holladay & Co., and that Ben Holladay & Co. dissolved, but never conveyed this property to the O. & C. R. R. Co., although I understand in a general way from Mr. Koehler that all this property was supposed to have passed to the O. & C. R. R. Co. shortly after its organization, and as a part of the transfer of the Oregon Central Railroad Company, the predecessor in interest of the O. & C. R. R. Co."

Will you please arrange as soon as convenient to have the examination suggested by Mr. Fenton made, and

furnish me with report. If desirable consult with Mr. Fenton so as to ascertain just what features he wants covered.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 37.)

THE OREGON RAILROAD & NAVIGATION CO.
SOUTHERN PACIFIC CO.—Lines in Oregon.

J. P. O'Brien,
Vice Pres. and Gen. Mgr. O. R. & N. Co.
Gen. Mgr. Sou. Pac. Co.—Lines in Oregon.
Portland, Oregon.

September 11, 1907.

Mr. Henry Conlin,
C. C., Land Dept., O. & C. R. R. Co.,
San Francisco, Cal.

Dear Sir:

Referring to conversation while here and repeating that my sister, who lives near the Ben Holladay tract mentioned in schedlue No. 5 of lands owned by the O. & C. R. R. Co. to which it has no title, is desirous of cutting some fallen trees on said tract into cordwood. The trees have been down for a long time and are practically without value, and I would appreciate it if permission could be given her through me to cut say from ten to fifteen cords thereof.

Yours truly,

C. G. SUTHERLAND.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 38)

ARTICLES OF INCORPORATION
OF THE
OREGON & CALIFORNIA LAND COMPANY.

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, E. E. Calvin, Wm. Crooks and W. W. Cotton, all of Portland, Oregon, do hereby associate ourselves as a corporation under the general incorporation laws of the State of Oregon and do hereby adopt the following

ARTICLES OF INCORPORATION.

ARTICLE I.

The name of the corporation shall be the Oregon & California Land Company.

ARTICLE II.

The duration of the corporation shall be perpetual.

ARTICLE III.

The purpose for which this corporation is formed is to engage in the following business, enterprises and occupations in any part of the world.

First. To acquire by purchase or otherwise, to own, hold, improve, cultivate, lease, rent, exchange, sell, convey, mortgage or otherwise dispose of land and real estate and any and all other kinds of property, personal

or mixed, or any interest therein and to convert and appropriate any such lands into or for roads or streets or other convenient uses as may be desired; and to lay out and dedicate to public use lands in townsites or otherwise.

Second. To lend and borrow money, and to take, give and receive security of any and every kind therefor; to borrow money on notes, mortgages, bonds or otherwise, and to mortgage, pledge, hypothecate and to give in trust all or any of its property to secure payment thereof.

Third. To do any and all things whatsoever necessary, proper or convenient to carry into effect the objects and purposes aforesaid.

ARTICLE IV.

The principal office of the corporation shall be at Portland, in the State of Oregon.

ARTICLE V.

The capital stock of the corporation shall be five thousand (5000) dollars and the amount of each share of the capital stock shall be one hundred (100) dollars.

ARTICLE VI.

E. E. Calvin, Wm. Crooks and W. W. Cotton or any two of them are hereby appointed to open stock books of the corporation and to receive subscriptions and organize the corporation.

ARTICLE VII.

The board of directors of the corporation shall consist of three members.

IN WITNESS WHEREOF, We have to this instru-

ment, executed in triplicate, set our hands and seals this 14th day of October, 1904.

E. E. CALVIN,
WM. CROOKS,
W. W. COTTON.

STATE OF OREGON,

County of Multnomah.—ss.

Be It Remembered, that on this 14th day of October, 1904, before me, the undersigned, a Notary Public in and for said County and State, personally came the within named E. E. Calvin, Wm. Crooks and W. W. Cotton, known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same as their act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my notarial seal the day and year last above written.

JAMES G. WILSON,
(Notarial seal) Notary Public for Oregon.
“ENDORSED”

Filed Oct. 14, 1904,

F. S. FIELDS, Clerk.

By F. W. PRASP, Deputy.

STATE OF OREGON,

No. 6979

County of Multnomah.—ss.

I, F. S. FIELDS, County Clerk and Clerk of the County Court of the County of Multnomah and State of Oregon, do hereby certify that the foregoing copy of articles of in-

corporation of Oregon & California Land Company has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original articles of incorporation as the same appears on file and of record in my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 21st day of September, A. D. 1911.

F. S. FIELDS,
County Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.
(Complainant's Ex. 39)

Know all men by these presents, That I, William Showers of Clackamas County, in the State of Oregon, in consideration of the sum of ten dollars lawful money of the United States to me in hand paid, the receipt whereof is hereby acknowledged have bargained, sold and conveyed and by these presents I do bargain, sell and convey unto Ben Holliday & Co., and to their assigns all and singular the following described property situate in said county of Clackamas, to-wit.:

All the fir trees or timber now being or growing upon my land claim in said county and state, said claim being situated in township (1) one south of range (2) two east, being the north $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 32, together with the right and privileges for said Holiday & Co. to enter upon said land and to cut and remove therefrom said timber and to erect and maintain a mill upon said

land claim for the purpose of cutting said trees or timber into such description of lumber as said Company shall desire and also the free use and occupation of sufficient land adjoining and surrounding said mill when located as shall be necessary or convenient for the purpose above mentioned or the convenience of said mill.

In Testimony Whereof, I have hereunto set my hand and seal this 19th day of November, A. D. 1868.

In the presence of

James Grindley,

WILLIAM SHOWERS.

A. L. Lovejoy.

(Seal)

(50-cent U. S. Int. Rev. stamp thereon and cancelled.)

STATE OF OREGON,

County of Clackamas.—ss.

Be it remembered on this 19th day of November, A. D. 1868, before me the undersigned personally came William Showers, to me personally known as being the person named in and who executed the foregoing indenture and acknowledged to me that he executed the same freely and voluntarily and for the purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

A. L. LOVEJOY,

Notary Public, Multnomah County,
in and for the State of Oregon.

(Seal)

Filed and recorded Dec. 2, 1868.

J. M. FRAZER,

County Clerk and Recorder.

STATE OF OREGON,

County of Clackamas.—ss.

I, L. E. Williams, Recorder of Conveyances, of the above named County and State, do hereby certify that the foregoing copy of deed from Wm. Showers to Ben Holliday & Co., as recorded in Book No. 3 at page 15 of deeds, has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original deed as the same appears of record in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed my seal this 18th day of September, 1911.

L. E. WILLIAMS,

Recorder of Conveyances.

By A. R. WILLIAMS,

Deputy.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 40)

Know all men by these presents, That I James Grindley, of the County of Clackamas, in the State of Oregon, in consideration of the sum of twenty 62/100 dollars lawful money of the United States to me in hand paid, the receipt whereof is hereby acknowledged, have bargained and sold and by these presents

I do bargain, sell and convey unto Ben Holiday & Co., and to their assigns all and singular the following described property situate in said Clackamas County, to-wit.:

All the fir trees or timber now being or growing upon my land claim in said county and state, said claim being situated in township (1) one south of range (2) two east, being the east $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and lots 5 and 6 of section 29, together with the right and privilege for said Holiday & Co. to enter upon said land and to cut and remove therefrom said timber and to erect and maintain a mill upon said land claim for the purpose of cutting said trees or timber into such description of timber or lumber as said company shall desire and also the free use and occupation of sufficient land adjoining and surrounding said mill when located as shall be necessary or convenient for the purpose above mentioned or the convenience of said mill.

In Testimony Whereof, I have hereunto set my hand and seal this 19th day of November, A. D. 1868.

In presence of:

E. Trafatte,

JAMES GRINDLEY.

A. L. Lovejoy.

(Seal)

(50-cent U. S. Int. Rev. Stamp thereon and cancelled.)

STATE OF OREGON,

County of Clackamas.—ss.

On this 19th day of November, A. D. 1868, before me the undersigned, personally came James Grindley to me personally known to me to be the person named in and who executed the foregoing indenture and acknowledged

that he executed the same for the purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year above written.

A. L. LOVEJOY,

(Seal) Notary Public Multnomah County, Oregon.

Filed for and recorded Dec. 2, 1868.

J. M. FRAZER,

County Clerk and Recorder.

STATE OF OREGON,

County of Clackamas.—ss.

I, L. E. Williams, Recorder of Conveyances, of the above named County and State, do hereby certify that the foregoing copy of deed from Jas. Grindley to Ben Holiday & Co., as recorded in Book No. 3 at page 17 of deeds, has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original deed as the same appears of record in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed my seal this 18th day of September, 1911.

L. E. WILLIAMS,

Recorder of Conveyances.

By A. R. WILLIAMS,

Deputy.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 41)

This Indenture, Made the 5th day of October in the year of our Lord one thousand, eight hundred and sixty-nine, between Gardner Elliott and Betsy S. Elliott of Clackamas County, State of Oregon, parties of the first part, and Ben Holladay & Co., of the State of Oregon, party of the second part,

Witnesseth, That the said parties of the first part for and in consideration of the sum of two hundred dollars lawful money of the United States to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to their heirs and assigns forever, all that certain lot, piece or parcel of land lying, situate and being in Clackamas County, State of Oregon, bounded and described as follows, to-wit.:

The north half ($\frac{1}{2}$) of northeast quarter of section number thirty-two, Twp. 1 S., R. 2 E., together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the revision and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, claim of homestead, property, possession claim and demand whatsoever as well in law as in equity of the said parties of the first part, of, in or to the above described premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the above mentioned and described premises together with the appur-

tenances unto the said party of the second part, their successors and assigns forever. And the said party of the first part for themselves and heirs the above described and hereby released premises and every part and parcel thereof with the appurtenances unto the said party of the second part, their heirs, successors and assigns against the said party of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend against all parties except the United States.

In Witness Whereof, The said parties of the first part have hereunto set our hands and seals the day and year first above written.

Signed, sealed and delivered

in presence of:

GARDNER ELLIOTT,

F. O. McCown,

BETSY S. ELLIOTT.

Park Winans, as to Gardner Elliot.

(Seal)

Laura N. Brown, as to Betsy Elliot.

(50-cent U. S. Stamp cancelled thereon.)

STATE OF OREGON,

County of Clackamas.—ss.

On this 5th day of October before me, a Notary Public, personally appeared the above named Gardner Elliot and Betsey S. Elliot, his wife, to me personally known to be the identical persons described in and who executed the foregoing conveyance and who acknowledged to me that they executed the same for the uses and purposes therein named, and the said Betsey S. Elliot being by me examined separate and apart from her said husband acknowl-

edged that she executed the same voluntarily of her own free will and without fear or compulsion from any one.

In Testimony Whereof, I have hereunto set my hand and notarial seal on this the 5th day of October, A. D. 1869.

F. O. McCOWN,

(Seal) Notary Public in and for Oregon.

Filed for and recorded Oct. 16, 1869.

J. M. FRAZER, Clerk and Recorder.

By JAS. A. SMITH, Deputy.

STATE OF OREGON,

County of Clackamas.—ss.

I, L. E. Williams, Recorder of Conveyances, of the above named County and Stated, do hereby certify that the foregoing copy of deed from Gardner Elliott, et ux., to Ben Holladay & Co., as recorded in Book G, at page 239 of deeds, has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original deed as the same appears of record in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed my seal this 18th day of September, 1911.

L. E. WILLIAMS,

Recorder of Conveyances.

By A. R. WILLIAMS,

Deputy.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 42)

Know all men by these presents, That we, James Grindley of the County of Clackamas, in the State of Oregon, and Mary Ann, his wife, in consideration of the sum of one hundred and eighty seven $39/100$ dollars to us in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed and by these presents we do hereby grant, bargain, sell, convey and confirm unto Ben Holladay & Co., all that certain piece, parcel or tract of land situated in Clackamas County, State of Oregon, described as the east one-half (E. $1/2$) of the southeast one-fourth (S. E. $1/4$) and lots five and six (5 and 6) of section twenty-nine (29) in township No. one (1) South of range No. two (2) East, containing one hundred forty-nine and ninety one-hundredths ($149\ 91/100$) acres, together with all and singular the tenements or improvements thereon.

To have and to hold the same unto him the said Ben Holladay & Co., their heirs and assigns forever, and I the said James Grindley do for myself, my executors, administrators and heirs hereby covenant to and with the said Ben Holladay & Co., their heirs and assigns, that I will and my administrators and executors shall forever warrant and defend the above described premises unto him the said Holladay and his heirs and assigns against the lawful claims of all persons claiming or to claim the same by, through or under us.

In Testimony Whereof, We have hereto set our hands and seals this the 4th day of May, A. D. 1869.

In presence of us:

C. A. Dolph,

JAMES GRINDLEY,

J. A. Tyler.

(Seal)

(50c U. S. Int. Rev. Stamp thereon cancelled.)

STATE OF OREGON,

County of Multnomah.—ss.

Be it remembered that on this 4th day of May, 1869, before me, personally came James Grindley, personally known to me to be the individual who is described in and who executed the foregoing indenture and acknowledged to me that he had executed the same for the uses and purposes therein set forth.

In Testimony Whereof, I have hereto set my hand and affixed my notarial seal this the day above written.

C. A. DOLPH,

(Seal)

Notary Public for the State of Oregon.

Filed for and recorded July 24, 1869.

J. M. FRAZER,

County Clerk and Recorder.

STATE OF OREGON,

County of Clackamas.—ss.

I, L. E. Williams, Recorder of Conveyances, of the above named County and State, do hereby certify that the foregoing copy of deed from Jas. Grindley to Ben Holladay & Co., as recorded in Book G at page 179 of deeds, has been by me compared with the original, and that it is a correct transcript therefrom, and the whole of such original deed as the same appears of record in my office and in my care and custody.

In Testimony Whereof, I have hereunto set my hand and affixed my seal this 18th day of September, 1911.

L. E. WILLIAMS,

Recorder of Conveyances.

By A. R. WILLIAMS,

Deputy.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Ex. 43)

No. 1455.

CAPTION.

AN ABSTRACT OF TITLE TO

The following described premises, situate in the County of Clackamas, State of Oregon, to-wit.: The east half (E. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) and lots numbered five (5) and six (6) of section numbered twenty-nine (29), and the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section numbered thirty-two (32), in township one (1) south of range two (2) east of the Willamette Meridian.

PATENT.

United States to James Grindley.

Dated Aug. 5, 1869. Recorded in General Land Office in Vol. 1 at page 398. Not recorded in Clackamas County.

Grants the east half (E. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) and lots numbered five (5) and six (6), in Section numbered twenty-nine (29), in Township one (1) South, of Range two (2) East of the Willamette Meridian.

The above information derived from the local U. S. Land Office at Portland, Oregon.

LEASE.

James Gridley to Benj. Holladay & Co.

Consideration \$20.62. Dated and acknowledged Nov. 19, 1868. Recorded Dec. 2, 1868, in Book 3 of Deeds at page 17. Signed and sealed. Two witnesses.

This instrument is a lease to cut and take all the fir timber on the east half (E. $\frac{1}{2}$) of the southeast quarter South, of Range two (2) East of the Willamette Meridian, (S. E. $\frac{1}{4}$) and lots numbered five (5) and six (6) in Section numbered twenty-nine (29), in Township one (1) and to erect a mill thereon.

SPECIAL WARRANTY DEED.

James Grindley to Ben Holladay & Co.

Consideration \$187.39. Dated and acknowledged May 4, 1869. Recorded July 24, 1869, in Book "G" of Deeds at page 179. Signed and sealed. Two witnesses.

Conveys the east half (E. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) and lots numbered five (5) and six (6) of Section numbered twenty-nine (29), in Township one (1) South, of Range two (2) East of the Willamette Meridian. Containing one hundred and forty-nine and ninety one-hundredths (149.91) acres.

Wife, Mary Ann Grindley, is mentioned in deed as a grantor, but she neither signs nor acknowledges.

\$0.50 U. S. I. R. S. affixed.

PATENT.

United States to Gardner Elliott.

Dated May 2, 1870. Recorded in General Land Office in Vol. 1 at page 435. Not recorded in Clackamas County.

Grants the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section numbered thirty-two (32), in Township one (1) South, of Range two (2) East of the Willamette Meridian.

Certificate No. 693, dated Oct. 5, 1869.

The above information derived from the local U. S. Land Office at Portland, Oregon.

LEASE.

William Showers to Benj. Holladay & Co.

Consideration \$10.00. Dated and acknowledged Nov. 19, 1868. Recorded Dec. 2, 1868, in Book 3 of Deeds at page 15. Signed and sealed. Two witnesses.

This instrument is a lease to cut and take all the fir timber on the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section numbered thirty-two (32), in Township one (1) South of Range two (2) East of the Willamette Meridian, and to erect a mill thereon.

\$0.50 U. S. I. R. Stamp affixed.

WARRANTY DEED.

Gardner Elliott and Betsy E. Elliott, his wife, to
Ben Holladay & Co.

Consideration \$200.00. Dated and acknowledged Oct. 5, 1869. Recorded Oct. 16, 1869, in Book "G" of Deeds, page 239. Signed and sealed. Three witnesses.

Conveys the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section numbered thirty-two (32), in Township one (1) South, of Range two (2) East of the Willamette Meridian.

Warrants against all persons except the United States.
No scrolls about the printed seals.

\$0.50 U. S. I. R. Stamp affixed.

THE LAST WILL
of
BEN HOLLADAY,
Of Harrison, West Chester County, and State of
New York.

First—I give and devise and bequeath to my dearly beloved wife, Esther, my late residence in the City of Portland, in the State of Oregon, with the appurtenances, and also all the household furniture, plats, books, pictures and stores which may be therein at the time of my decease, and also the sum of fifty thousand dollars, TO HAVE AND TO HOLD to her, her heirs, Executors and Administrators forever.

Second—I give to my son Ben Holladay, Junior, all my interest in the Steamships Pelican and California TO HOLD to him and his legal representatives forever.

Third—I give, devise and bequeath all the rest, residue and remainder of my property and estate, real and personal wheresoever the same may be situate of which I may be seized, possessed or entitled to at the time of my decease, to my grand-daughter, Marie, daughter of my daughter Jennie, now deceased, formerly the wife of Count Arthur de Pourtales, TO HAVE AND TO HOLD to her, her heirs, Executors and Administrators forever.

Fourth—I declare the foregoing provision in favor of my wife to be in lieu and bar of dower and thirds and marital interests in my estate and I hereby revoke all other Wills by me at any time heretofore made, and hereby appoint my brother, Joseph Holladay, of San

Francisco; Major Henry Hampton, my present agent in Portland, and Samuel L. M. Barlow, Executors of this my last will and testament without security and I do give them full authority to sell either for cash or upon credit or partly for cash and partly upon credit at public or private sale, and convey any or all of my real estate in their discretion and to convert the same or any portion thereof into cash or securities to their satisfaction.

IN WITNESS WHEREOF I have hereunto set my hand and seal this twenty-seventh day of September, one thousand eight hundred and seventy-five.

BEN HOLLADAY.

(Remnant of a red wax seal.)

Signed, sealed, published and declared by the testator Ben Holladay as and for his last will and testament in the presence of us who at his request in his presence and in the presence of each other (being all present during the whole time) having hereunto subscribed our names as attesting witnesses the day and year last above written:

GEORGE K. OTIS,

111 Taylor St., Brooklyn, N. Y.

GEORGE F. OTIS,

111 Taylor St., Brooklyn, N. Y.

S. D. THOMAS,

229 Sanford Street, Brooklyn.

Filed Aug. 8, 1887. Recorded in Record of Wills for Multnomah County in Vol. 3 at page 568 thereof.

IN THE COUNTY COURT OF THE STATE OF
OREGON,

For the County of Multnomah.

In the Matter of the Estate of Ben Holladay, Deceased.

PETITION: The Petition of Esther Holladay and Joseph Holladay (verification by Joseph Holladay) for probate of the last will of Ben Holladay, and for the appointment of one of the Petitioners, Joseph Holladay, to be the Executor of the last will and testament without bonds, and for the appointment of Geo. W. Weidler to be the Administrator with the will annexed to act with said Joseph Holladay in the administration of the said estate, among other things, represents:

That Ben Holladay died on or about the 8th day of July, 1887, in the County of Multnomah, and State of Oregon.

That the next of kin of said deceased, and whom your petitioners are advised and believed, and therefore allege to be the heirs at law of said deceased, and the names, ages and residences of said heirs are:

Esther Holladay, aged — years, residing at Portland, Oregon; the said Esther Holladay is the widow of said deceased.

Linda, aged ten years, Benjamin, aged eight years, both of whom are the children of said deceased and said Esther Holladay, and reside in Portland, Oregon.

Marie de Pourtales, the grand-daughter of said deceased, and who is the daughter of Jennie de Pourtales (who is the deceased daughter of said deceased), aged about sixteen years and residing in Paris, France.

Paul de Beauceie, son of Polly de Beauceie (who is the deceased daughter of said deceased), aged about thirteen years, residing in Paris, France.

Benjamin Holladay, a grand-son of said deceased, be-

ing the son of Benjamin Holladay, Junior, now deceased (who was the son of said deceased) residing at Honolulu, and aged about twelve years.

Dated Aug. 8, 1887.

Filed Aug. 8, 1887.

IN THE COUNTY COURT OF THE STATE OF
OREGON,

For the County of Multnomah.

In the Matter of the Estate of Ben Holladay, Deceased.
Order.

Now at this time coming on the instrument purporting to be the last Will and Testament of Ben Holladay, Deceased, for probate upon the proofs taken before C. A. Searls, the duly appointed commissioner of this Court to administer the interrogatories to George K. Otis, George F. Otis and the witnesses to said Will, which interrogatories were ordered by this Court on the — day of —, 1887, to be forwarded by the Clerk of this Court to said Searls for the purpose aforesaid and said interrogatories having been duly propounded to and answered by said witnesses and thereupon returned to this Court, and it appearing that the proofs of said Will are in all things regular.

It is hereby ORDERED and ADJUDGED that said instrument in writing, purporting to be the last Will and Testament of Ben Holladay, Deceased, which was executed on September 27, 1875, was properly executed according to and in the manner prescribed by law for the execution and attestation of last Wills and Testaments, and is genuine and valid. That said Ben Holladay, Deceased, at the time of the execution of said instrument,

to-wit.: September 27, 1875, was in all respects competent to execute the same and was not under restraint or undue influence. That said instrument be, and the same hereby is, admitted to probate and established as the last Will and Testament of Ben Holladay, deceased.

And the appointment of the executor named in said Will being contested by Mrs. Esther Holladay, widow of Ben Holladay, Deceased, is not now made, but such appointment is taken under advisement by the Court.

Dated October 11, 1887.

Recorded in Probate Journal in Vol. 4 at page 254 thereof.

IN PROBATE.

ORDER overruling protest of Esther Holladay, widow of Ben Holladay, Deceased, and appointing Joseph Holladay the sole Executor, without bonds, of the estate of said Ben Holladay, Deceased. Dated Oct. 18, 1887. Recorded in Vol. 3 of Probate Journal at page 259 thereof. This Order recites that upon argument it was admitted by the Counsel of Joseph Holladay that an Administrator could not be appointed to act with said Executor and that thereupon a request was made to withdraw that portion of the Petition of said Joseph Holladay asking for the appointment of George Weidler as Administrator of said estate of Ben Holladay, deceased, in conjunction with said Joseph Holladay as executor, and that the said request for withdrawal was at that time granted.

INVENTORY AND APPRAISEMENT: Dated May 31, 1889. Filed May 31, 1889. The Inventory does not include, nor is any reference made therein to the premises

described as follows, to-wit.: The east half (E. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$), and lots numbered five (5) and six (6) in Section twenty-nine (29), and the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section thirty-two (32) in Township one (1) South, of Range two (2) East of the Willamette Meridian in Clackamas County, State of Oregon.

IN THE COUNTY COURT OF THE STATE OF
OREGON,

For the County of Multnomah.

In the Matter of the Estate of Ben Holladay, Deceased.
Order.

Now at this time comes on regularly to be heard the final account and report of James Steele, as Administrator with the Will annexed of the estate of Ben Holladay, Deceased, heretofore rendered and filed in this Court, this being the time and place fixed for the hearing and settlement of the same, and it appearing to the Court that due notice of the filing of said account and of the time and place of hearing the same has been given in all respects as required by law and the order of this Court, and that due proof of the publication of such notices has been duly made and filed herein, and that no exceptions or objections in writing or otherwise to said account, have been taken or made or filed herein. And it further appearing to the Court that there are no funds in the hands of said Administrator, after the allowance and payment of his commission allowed by law, to pay any further dividends upon the claims presented herein within the first six months from the date of the notice to creditors, or to pay any part of the debts or claims

against said estate not presented within said six months, or to pay any of the remaining expenses of the administration of said estate; that said estate has been fully, fairly and justly administered and is in a proper condition to be closed, and that said final account is a just, true and correct statement of the amount of money and property accounted for by said administrator and of the amounts disbursed by him, and that vouchers have been duly filed herein with the several semi-annual accounts and reports of said Administrator showing said disbursements, in all respects as required by law; and that said Administrator has duly and properly accounted for all money and property coming into his hands as such Administrator, and no good reason appearing or being shown to the Court why said final account should not be settled or allowed.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the administration of said estate be closed, and that said final account of said administration heretofore filed herein be, and the same hereby is, fully and in all respects allowed, approved and confirmed. And it is further ORDERED, ADJUDGED and DECREED that said Administrator be, and he is hereby, fully and finally discharged from his trust as such Administrator, and that the sureties on his official bond be, and they are hereby discharged from all liability as such sureties.

Dated Sept. 10, 1900.

Recorded in Probate Journal in Vol. 30 at page 69 thereof.

MORTGAGES.

The Abstracter finds no mortgages made of record in Clackamas County by any one shown to be connected with the title covering any part of the premises described in the Caption hereof.

JUDGMENTS.

The Abstracter finds no judgments made of record in Clackamas County, nor actions or suits pending therein, affecting the title to the premises described in the Caption hereof.

TAXES.

All taxes levied upon the premises described in the Caption hereof appear to be fully paid.

CERTIFICATE.

STATE OF OREGON,

County of Multnomah.—ss.

The CLACKAMAS TITLE COMPANY, a private corporation having its principal place of business at Portland, Oregon, and which is an abstracter of titles to lands in Clackamas County, does hereby certify that it has caused to be made by its President, E. F. Riley, a careful and diligent search of the records of said county for all matters relating to the land described in the Caption hereof, being the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and lots 5 and 6 of Section 29, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 32, in Township one (1) South, of Range two (2) East of the Willamette Meridian, and that it finds no instruments affecting the title to said property nor liens thereon made of record in said county except such as are shown in the foregoing abstract consisting of eighteen (18) sheets this

1374 *The Oregon & California Railroad Co.*

second (2nd) day of December, 1907.

CLACKAMAS TITLE COMPANY,

No. 1455.

By E. F. Riley, President.

Carbon copy retained.

No. 3148.

CLACKAMAS TITLE COMPANY,

Portland, Oregon.

Continuation of an

ABSTRACT OF TITLE

to

The following described premises situate in the County of Clackamas, State of Oregon, to-wit.: The east half (E. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) and lots numbered five (5) and six (6) of Section numbered twenty-nine (29) and the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of Section numbered thirty-two (32) in Township one (1) South, of Range two (2) East of the Willamette Meridian. For the period of time since the 1st day of December, 1907, to the present time.

MORTGAGES.

The Abstracter finds no mortgages made of record in Clackamas County by any one shown to be connected with the title, since the 1st day of December, 1907, covering any part of the premises described in the caption hereof.

JUDGMENTS.

The Abstracter finds no judgments made of record in Clackamas County, nor actions or suits pending therein, since the 1st day of December, 1907, affecting the title to the premises described in the caption hereof.

TAXES.

1907.....	Paid
1908.....	Paid
1909.....	Paid
1910.....	Paid

CERTIFICATE.

STATE OF OREGON,

County of Multnomah.—ss.

THE CLACKAMAS TITLE COMPANY, a private corporation having its principal place of business at Portland, Oregon, and which is an abstractor of titles to lands in Clackamas County, does hereby certify that it has made a careful and diligent search of the records of said County for all matters relating to the land described in the Caption hereof, being the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ and Lots 5 and 6 of Section 29 and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 32, Township 1 South, of Range 2 East of the Willamette Meridian,..... and that it finds no instruments affecting the title to said property nor liens thereon made of record in said County since the 1st day of December, 1907, except such as are shown in the foregoing abstract consisting of three (3) sheets; but this abstract does not include any examination of, or report on, any proceedings for the establishment, vacation or changes of roads.

Dated at Portland, Oregon this thirty-first day of March, 1911.

CLACKAMAS TITLE COMPANY,

By E. F. Riley,

President.

No. 3148.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Exhibit 44.)

Portland, Ore., Oct. 30, 1907.

Messrs. Angell & Fisher,

Portland, Ore.

Gentlemen:

In compliance with instructions in your letter of the 29th, I have examined the "Holladay Tract," in Clackamas County, Ore., consisting of E $\frac{1}{2}$ of SE $\frac{1}{4}$, and Lots 5 and 6 (W $\frac{1}{2}$ of SW $\frac{1}{4}$, fractional), of Sec. 29, and N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 32, all in T. 1 S., R. 2 E.

The tract is divided by the Milwaukie County Road on the section line between sections 29 and 32:

E $\frac{1}{2}$ of SE $\frac{1}{4}$ and Lots 5 and 6 (Frac. W $\frac{1}{2}$ of SE $\frac{1}{4}$), Sec. 29, 149.91 acres.

POSSESSION:

This tract, we are advised by W. H. Counsell, was open, vacant land, not occupied by anyone, until fenced by the Oregon & California R. R. Co., in the summer or late spring of 1905. It still remained unused until about March 14, 1906, when it was leased to W. H. Counsell, at a rental of \$25.00 for the term ending Dec. 31, 1906. Mr. Counsell advises he did not use the land himself, but allowed a neighbor to pasture cattle on the land, paying him, Counsell, \$25.00.

Upon the expiration of the lease Mr. Counsell received a letter from Mr. Charles W. Eberlein, Acting Land Agent, O. & C. R. R. Co., asking if he desired the land for the ensuing year. He answered advising that he

desired it on the same terms, and received reply that a lease was prepared and would be forwarded when the rental was received. Mr. Counsell never sent the money, but allowed a man named Coyle to pasture five horses on the tract during the present season. Mr. Counsell says he is trying to collect \$25.00 from Coyle, that if Coyle will not pay him he, Counsell will still pay the O. & C. R. R. Co. Mr. Counsell was asked to call at the office of Angell & Fisher in the course of a week or so and straighten the matter out.

IMPROVEMENTS:

The only improvement on the tract is a fence, that on the East, South and West sides having been placed thereon by the Anchor Fence Co., of Portland, on their bid to the O. & C. R. R. Co. of March 1, 1905, of 65 cts. per rod, specifications as follows, Posts 6-inch face, 1½ rods apart, 4-strand Anchor Fence, wires No. 10 wire, with 5 upright stay wires to each panel, of No. 8 wire. One wire gate is in this fence and the fence is in excellent condition, except at one point where three strands are broken, but could be repaired at slight expense. On the North side, however, the fence is much older, of 3-strand barb wire, posts rotten, but could be patched up for two or three more seasons. However, this fence encroaches on the O. & C. R. R. Co. land about 40 feet at West end and thence runs diagonally to the Northeast corner of the land.

CHARCATER OF LAND:

This land is practically level. There is no timber, and successive fires have destroyed even the brush except on

about 10 acres in Southeast corner, where there is small fir and hazel. Soil is stony 2nd rate. Much burned down timber, cost to clear \$50.00 per acre. A gravel pit on east side, from which about 500 loads have been removed, is no longer used.

LOCATION AND VALUE:

The Northwest corner of this tract is 72 rods southeast of Dell station on the Portland-Cazadero electric railway, 30 minutes ride from Portland's business center, fare 10 cts., two-hourly service. A tract of about 100 acres adjoining the above mentioned tract on the west was platted in 1906 as "Finavon," in $2\frac{1}{2}$ acre tracts, by A. S. Patullo, the lowest price now asked for these tracts is \$300.00 per acre and a number have been sold, including some tracts as far from the electric line as the southerly line of the portion of the Holladay tract above mentioned. The latter tract could be sold in small tracts at \$300.00 to \$350.00 per acre.

There is no water on the tract, making it less desirable for pasturage. Mr. Counsell does not seem to want to rent the land, and it could probably be let for a large rental to other parties.

There is considerable sound firewood in the down timber, but it does not seem to be of salable value under present conditions. $N\frac{1}{2}$ of $NE\frac{1}{4}$, Sec. 32, T. 1 S. R. 2 E.

POSSESSION:

M. C. Thompson advises this tract was open and not occupied by anyone, until fenced by The O. & C. R. R. Co. in the summer of 1905. It remained unused until about March 14, 1906, when it was leased to M. C. Thompson for \$20.00 for term ending Dec. 31, 1906. This lease

was renewed Feb. 21, 1907, by the Oregon and California Land Company, executed by Charles W. Eberlein, Acting Land Agent, and W. W. Cotton, Secretary, for term ending Dec. 31, 1907, Lease No. 3-L. rental \$20.00. Mr. Thompson has a number of cattle, five to ten, on the tract.

IMPROVEMENTS:

No improvements are on this land except fencing. It is fenced on North East and West with 4-strand Anchor fence, Posts, 6-inch face, 1½ rods apart, strands of No. 10 wire, with 5 upright stay wires, of No. 8 wire to each panel, and contains one gate. This portion of the fence was placed thereon by O. & C. R. R. Co., by contract with Anchor Fence Co., at 65 cts. per rod. It is in excellent condition except along west side, where about two days' work is required to remove small trees which have fallen across same. The fence along south side is older, but has been kept in good condition by other parties. The tract is cut by a 60-foot county road, diagonally at East edge, leaving a triangular tract containing about 6 acres, and this tract also was fenced by the O. & C. R. R. Co. under above contract, and fence is in good condition, having one gate.

CHARACTER OF LAND:

The North 30 acres is gravelly soil, 2nd rate, balance lies about 25 feet lower, excellent soil, but very heavy down timber and expensive to clear. Cost of clearing \$50.00 on upland, \$75.00 on lower land. Successive fires have destroyed timber and brush, except on 25 acres at East end, where there are about 15 fir trees to the acre, average 6" dia., besides alder, etc.

LOCATION AND VALUE:

The Northwest corner of this tract is three quarters of a mile from Dell Station on Portland-Cazadero electric railway, 30 minutes from Portland, 10 ct. fare, two-hourly service, 2½ acre tracts near by and not more favorably situated than the Northwest corner of this tract have been sold at \$300.00 per acre, though of much inferior soil, and this land should be worth that price if sold in small tracts.

Mr. M. C. Thompson says there is great danger of the fence being destroyed by fire, and that in 1906 it was only prevented from burning by several days works of himself and others. Undoubtedly Mr. Thompson will desire to renew the lease.

Mr. Thompson says a man could "make wages" cutting firewood from the down timber, which is very heavy on this tract. Under labor conditions at present time it does not appear that anyone would pay for any considerable amount for this down timber.

Very truly,

BEN IRWIN.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Complainant's Exhibit 45.]

THE ANCHOR FENCE COMPANY

Manufacturers of

Farm, Field and Railroad Fence Patented Wire Bound
Gates

130 Front Street.

Geo. T. Murton, Secretary and Manager.

Portland, Oregon, March 1, 1905.

Mr. F. A. Elliot,
606 Fifth Street,
City.

Dear Sir:

In the matter of building a fence around the property of the O. and C. Railroad Company at Lents, Oregon, the same being about 994 rods in length, we will be pleased to clear up the line sufficiently for building the fence and erect a 4-strand Anchor Fence with posts $1\frac{1}{2}$ rods apart, the same to be set 2 feet in the ground, with 5 upright stays in each panel of $1\frac{1}{2}$ rods, and to supply and hang three 12-foot wire bound gates, at the rate of 65c a rod. The posts to be split cedar with a 6-inch face. The wire in the strands to be No. 10 hard drawn Coiled Spring steel wire and the upright stays to be No. 8 gal. wire. . . .c-calledNetaoishrdluetaoishrdlushroidinu galvainzed wire.

If our bid meets your approval, we shall be pleased to see that the work is done in a workmanlike manner, securely anchoring all the end and corner posts and making a first-class job of it in every respect.

Hoping that these figures will meet with your approval, we are,

Very respectfully,
THE ANCHOR FENCE COMPANY.
By GEO. T. MURTON,
General Manager.

M-J

LAND DEPARTMENT.

Oregon and California

1382 *The Oregon & California Railroad Co.*

Railroad Company.

San Francisco, Cal., April 4, 1906.

Mr. F. A. Elliott,
Care Angell & Fisher,
Fenton Building,
Portland, Oregon.

Dear Sir:

I have yours of the 2d instant, advising that you had forwarded plat and filed notes of the survey of the Holladay Tract. Said notes and plat were received today by express.

Thanking you for your prompt attention to this matter, I remain,

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Portland, Ore., April 2, 1906.

Mr. Charles W. Eberlein,
Acting Land Agent, O. & C. R. R. Co.,
San Francisco, Cal.

Dear Sir:

I am sending you today, by express, plat and field notes of the survey of the Holladay Tract, made some time in 1905, and called for in your letter of recent date.

These papers were found in Mr. Bristol's office.

Yours very truly,

F. A. E.

Portland, Ore., March 31, 1906.

Mr. Chas. W. Eberlein,
Acting Land Agent, O. & C. R. R. Co.,

Merchants Exchange, San Francisco.

Dear Sir:

I am in receipt of your letter of the 29th instant, in regard to field notes of the Holladay Tract, and in answer will say:

I was in possession of these notes and plat, for a few days, at the time I examined the survey, but returned them to Mr. Briston. I will see Mr. Bristol as soon as possible, and ascertain if I can what disposition has been made of them.

Yours very truly,

F. A. E.

LAND DEPARTMENT.

Oregon and California

Railroad Company.

San Francisco, March 29, 1906.

Mr. F. A. Elliott,

Care Angell & Fisher,

Fenton Building,

Portland, Oregon.

Dear Sir:

In January, 1905, field notes and plat of the Holladay tract were sent to Mr. Bristol for the purpose of enabling him to take up with you the matter of the fencing of the land mentioned. I am unable to locate said notes and plat from our correspondence file I think it altogether likely that they were turned over to you by Mr. Bristol, to assist you in looking after the fencing, which was done a month or two thereafter.

Will you kindly trace these notes and plats and forward them to me.

An early reply to this letter is desired.

Yours truly,

CHARLES W. EBERLEIN,

Acting Land Agent.

Portland, Ore., Oct. 7, 1906.

Mr. Chas. W. Eberlein,

Acting Land Agent, O. & C. R. R. Co.,

Merchants Exch. Bldg., San Francisco.

Dear Sir:

In looking over our tract of land in Secs. 29 & 32, Tp. 1 S., R. 2 E., recently fenced, I find that W. H. Counsell, of Lents, Oregon, who is Road Supervisor for that District in Clackamas County, has been taking gravel from the old gravel pit on the east line of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 29, and under instructions of the County court of said county.

I am also reliably informed that private parties have been getting gravel from this pit recently. Now, in order to get to this gravel our new fence has been damaged to such an extent as to let cattle in at any and all times, practically making the fence useless. As I understand the case the county court of Clackamas County claims the right to take gravel for the public use wherever they find it. If such is the case they should at least be asked to put in a gate and keep the fence in repair. I am not conceding this point, however, and have hired a man to fix this gap in the fence, and will put trespass notices on same unless I hear from you to the contrary.

Yours very truly,

F. A. E.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

(Complainant's Exhibit 46, 47, 48.)

EXTRACTS FROM THE DEPOSITION OF BEN HOLLADAY, TAKEN IN THE DISTRICT COURT OF THE FIFTEENTH JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

IN THE CASE OF,

S. G. ELLIOTT,

Plaintiff,

vs.

BEN HOLLADAY, et al.,

Defendants.

Taken before James G. Carson, a Notary Public, in and for said State and County, on the twenty-seventh day of December, 1870, and introduced in evidence before the Referee, in the case of **BEN HOLLADAY** and **C. TEMPLE EMMETT**, vs. **S. G. ELLIOTT** and others, and on file in the records of said cause, in the Supreme Court of the State of Oregon.

385. Q. Have you not, in the course of your business, during the last two or three years, made inquiries into what men's wages in Oregon are?

A. Well, sir, I certainly ought to know, because the railroad has been hiring a great many men.

385. Q. Have you not made inquiries, and do you not know what the price of ties is in Oregon?

A. Yes, sir.

387. Q. Do you not know what the price of iron is per mile, such iron as you laid down?

A. I know what it cost, sir.

388. Q. You also know the lay of the land, and about how much grading is necessary?

A. No sir; when it comes to the grading part, I could not tell you; I am not a practical engineer. I know nothing about grading.

389. Q. Now, from those items of which you have knowledge, what should you say was a reasonable cost of making that twenty miles, and putting it in running order?

A. Well, I really could not tell you without going into figures, and I do not know the cost of grading the road. I know the cost of iron and ties, and all that, but I do not know anything about grading.

390. V. Take it, then, all except the grading. Leave out the grading, as that is something you are uncertain about.

A. Well, the iron costs about eighty dollars to a ton, and it takes about eighty tons of iron to the mile. The ties, I really could not tell what they cost, because we sawed the ties for the first twenty miles. I do not know what they did cost.

391. Q. Can not you give it approximately?

A. No sir; for the single reason that they were sawed by our own mills, and the mills cost a great deal of money, and what would be the depreciation of the property of the mills while sawing the ties, is a thing I could not take into consideration.

392. Q. To whom did those mills belong that you

speak of ?

A. The mills were built by Ben Holladay & Co.

393. Q. Meaning by Ben. Holladay & Co.—Holladay, Elliot & Emmet?

A. Two of the mills were built after we formed this copartnership.

394. Q. Were those mills included in the transfer from the Oregon Central Railroad Company to the Oregon and California Railroad Company?

A. I think they were, sir.

395. Q. How much money did those mills cost?

A. I do not recollect, sir.

396. Q. About?

A. I cannot tell you. I have no recollection of the cost. I know what we have sold them for; we have sold both. They were sold by the Oregon & California, and one of the mills was sold for three thousand five hundred dollars, and I think the other was sold for the same price. I know we offered them for that. I do not know whether they sold for that or not; but they cost a very large amount of money. I would not be positive whether they were sold for that.

397. Q. They were sold very much below the cost?

A. Oh, very much, indeed, sir.

398. Q. About how much below the cost?

A. Well, sir, I suppose we must have lost twenty thousand dollars on the mills. * * *

1953. Q. Have you purchased any property in Oregon since?

A. Yes, sir, I have purchased a considerable amount.

1954. Q. At what expense?

A. Since when do you mean?

1955. Q. Since the 12th of September, 1868?

A. Well, I purchased about two hundred and fifty or two hundred and sixty acres of land in East Portland.

1956. Q. At what expense?

A. At a cost I think of about some \$70,000 to \$80,000.

1957. Q. How was it paid for?

A. Paid for in cash. No; hold on a minute; let me give a list of the property I own in Portland, and then you can ask what questions you please about it. I own 167 blocks in East Portland, which cost about \$70,000 to \$75,000; I do not recollect the exact amount; the present cash value is about \$1,750 a block. And then I own half a block fronting the steamship wharf at Portland, worth \$10,000. And then my interest in the Dock Company Lands and mill at Portland, which is under mortgage for \$55,000; the value, however, above the liability is \$45,000. I have been very particular about this, and have got this right, because I know it. And then I own one-fourth interest in the Mitchell & Smith Addition to East Portland, which is in debt about \$10,000, and my interest in it, above the indebtedness, I value at \$20,000. Then a house, lot and furniture, with extra house and lot in the rear, at Portland, \$37,000; the Hoffman House, lot and furniture at Portland, \$10,000. In addition to the above, I have acquired in December, 1870, an interest in the West Side Oregon Central Railroad, at a low valuation, \$100,000.

1958. Q. That is, what you value it at that?

A. Yes, sir; the work, franchise, and property. I

will answer any questions at the proper time. These fourteen fractional blocks of property equal to ten blocks in Portland, which cost \$64,000, valued at \$100,000. That is all there is at Portland. Now, there is another thing—you asked me what property I owned in the East, and I see something here which I omitted; I owned an interest, bonds and stock, the amount I do not recollect, in the Atlantic and South Pacific Railroad—I think that is the name of it—which I realized for, afterwards, in cash and exchange of other stock and bonds, about \$100,000. My lots and property in Portland and East Portland are in the names of William L. Halsey, Ben Holladay, Jr., and George W. Weidler. It was all bought for me, with my money, and put in their names in order to facilitate sales and transfers, as my wife was in Europe. The deeds from them to me are in my safe at Portland, but have not ever been recorded.

1959. Q. Mr. Patterson. Have the properties you have spoken of in Oregon been paid for, and if so, out of what fund?

A. They are paid for, out of my own money, and all paid for except what you see here, what I have explained in the different items as being incumbered.

1960. Q. Can you tell from what source the money which paid for those different pieces of property was derived?

A. The most of it, sir, was derived from drafts on the North Pacific Transportation Company. In 1868 I had one tract of land, in Kansas, of 4,200 acres, unincumbered, worth then about ten or twelve dollars an acre. Since then I have sold—I cannot tell the exact

amount, don't you understand—I have about 1,000 or 1,200 acres of that land, and have remaining now 3,000 acres, or about that, that I value at fifteen dollars an acre or more. In Missouri, in 1868, I had one farm of 1,200 acres of land, valued then and now at about the same price—\$36,000. I had another farm of two hundred acres, then and now valued at about the same price—I do not know that there is much difference—at \$12,500 for the farm. In St. Joseph, Missouri, I had three lots and a mortgage on a lot in addition to that. I loaned the money, don't you understand, on another lot—the mortgage and the value of the property together amounting to, say \$4,500; and I also owned in Nebraska, lying on the Missouri River, a tract of 1,500 acres of land, valued at twenty dollars an acre; probably it is valued at twenty dollars now. I do not suppose it was worth so much in 1868, but it has increased somewhat in value since then. Then I owned a number of lots in the town of Aspinwall, Nebraska, upon this tract of land I spoke of; I do not know how many lots, or the number of the lots, nor I do not know the value. There has been no change that I know of in this Aspinwall, Kansas, or this other property; or, if there has been any, it has been increasing. Then I own a farm in Iowa, or a tract of land of two hundred and forty acres, in 1868 and now worth, I suppose, about \$2,500. Then I owned then, and own now, one-twentieth interest in the Lower California Land Company, the value of which I do not know, but probably it is valued at \$20,000. Then I own one-twentieth interest in the San Domingo Land Company, which is probably worth \$50,000, but I will put the value at

\$25,000. Then I own a good and substantial claim against the United States Government, amounting to about \$500,000. Then I have a large number of town lots in the city of Denver, Colorado Territory, that are in litigation. I do not know the value. I own a banking house in Central City, Colorado, the title to which is in dispute. Also, three-fourths of thirty-five acres of land adjoining the city of Victoria, Vancouver Island, and a tract of land near Olympia, Washington Territory, the value of which I do not know anything about. I have also 15,000 shares in the European and Oregon Land Company, upon which I have paid an assessment of some \$8,000, I believe. Its value is nothing, that I know of. That is all, sir, that I recollect of now. I think, upon reflection, that I have got a house somewhere in town that is in my own name, and I give you my word I do not know whether it belongs to me or to the North Pacific Transportation Company, but I was sued upon it, the other day, for a street assessment. Then I own a couple of lots—I do not know how valuable they are—over in Alameda. I suppose there is no value to them. Then I own 27,591 shares of stock in the North Pacific Transportation Company, valued in 1868 at about forty, and now at about fifty cents on a dollar. I also owned at New York, in September, 1868, and since, 750 shares Credit Mobiler stock of the Union Pacific Railroad.

1961. Q. When did you acquire the interest in the West Side Oregon Central Railroad Company?

A. Well, I first acquired the interest a year ago. Let's see—I should think about a year ago.

1962. Q. At what expense?

A. At the expense, first, I suppose of about \$25,000 or \$30,000.

1963. Q. How did you pay it?

A. I paid it in cash.

Also Extracts from the Testimony of Ben Holladay, taken before J. C. Moreland, Referee, in the above entitled cause of **Ben Holladay**, and **C. Temple Emmett** v. **S. G. Elliott**, et al., on the third day of April, 1871, at Portland, Oregon.

Int. 22d. State fully all the property owned by the firm of Ben Holladay & Co. at the date of the commencement of this suit, and its value.

Ans. The contracts referred to, together with the bonds and stocks of the Oregon Central Railroad Company, to which they were entitled under said contracts, and all of which were then and ever since have been of merely nominal value. They had no marketable value whatever, and no real value considering all the surroundings and circumstances of the case, the litigation existing, and the impossibility of going forward with the enterprise under these contracts for the reasons stated. Aside from these contracts the firm of Ben Holladay & Co. had nothing excepting two saw mills and a small machine shop; also, some personal property, consisting of shovels, picks, cattle, etc.—the exact value of which I do not know. Mr. Weidler will know as he had charge of the property and can tell all about it.

Int. 23d. State when the firm of Ben Holladay & Co. practically ceased to do business as such firm?

Ans. The latter part of December, 1869, when the

first 20 miles of road were completed.

Int. 24th. State what has become of the interests which the defendants Gardner Elliott and T. R. Brooks had in the contracts referred to and in the firm of Ben Holladay & Co.?

Ans. I have purchased all their interests in both since the commencement of this suit. And they have transferred and released all their interests in said contracts and in the firm of Ben Holladay & Co. They neither of them have any interest in them now or in the result of this suit.

Int. 24th. State if you have in your possession the original contracts between the Oregon Central Railroad Company and A. J. Cook (so-called) and A. J. Cook & Co. to-wit: of April 23d, 1867, of November 27th, 1867, another one of date May twelfth, 1868, and of June 10th, 1868. And which were assigned and transferred to the firm of Ben Holladay & Co., or attempted to be. If so, please furnish to the Referee two copies of each thereof and mark them respectively "A," "B," "C," and "D" and attach them as a part of your answer to this interrogatory.

Ans. I have them and herewith furnish them as a part of this answer.

Ben Holladay.

Attest:

J. C. Moreland, Referee.

Memorandum:

I hereby certify that the annexed exhibits marked respectively "A," "B," "C" and "D" are the copies of

contracts furnished by Ben Holladay in answer to the last interrogatory to the foregoing deposition.

April 3d, 1871.

J. C. Moreland,
Referee.

**EXHIBIT "A" ATTACHED TO BEN HOLLADAY'S
DEPOSITION.**

Memorandum of an agreement made this 23d day of April in the year of our Lord one thousand eight hundred and sixty-seven (1867) by and between the Oregon Central Railroad Company organized under and in accordance with the general laws of the State of Oregon of the first part, & Albert J. Cook of the second part, WITNESSETH.

That whereas the party of the first part own the right privilege and franchise for constructing, equipping and running a railroad from Portland in the State of Oregon South to the California line, and whereas the party of the second part doth agree and hereby agrees with the party of the first part to build and equip One hundred and fifty miles of said railroad with all necessary rolling stock from Portland South through the Willamette Valley for the sum of Five millions Two hundred and fifty thousand dollars (\$5,250,000.00/100) reckoned at gold or specie value that is to say if payment from time to time be made in National Currency now so called it shall be in payment for so much only as the same is worth in gold at the time of such payment and it so shall be reckoned with anything else that may be received in payment at the time of such payment.

And the party of the second part doth further agree with the party of the first part to build and equip with rolling stock complete for the working of the same that is to say the road shall be built upon a uniform guage of four (4) feet eight (8) and one-half ($1\frac{1}{2}$) inches the maximum grade not to exceed eighty feet (80 ft.) per mile, and a minimum curvature of ten degrees (10). The width of the road bed to be eleven feet on the surface, the iron used shall be the best quality known as T rail weighing at least forty-five pounds per linear yard. The ties shall be of the best wood to be obtained for strength and durability not less than six by eight inches and eight feet in length, to be laid at the rate of two thousand six hundred and forty feet per mile. The amount of rolling stock shall consist for the first division of twenty-five miles extending from Portland to the French Prairie of two first class locomotives, weighing not less than sixteen tons, each; two first class passenger cars, two baggage or express cars. The next division of about twenty-five miles reaching to Salem, one first class locomotive of not less than sixteen tons weight, two first class passenger cars, one baggage car, twelve box cars and two platform cars. For the next division of about twenty-five miles reaching to Albany, One first class locomotive weighing not less than twenty-six tons, two first class passenger cars, one baggage car, twelve each box and platform cars. For the next division of about ten (10) miles reaching to near Corvallis, one first class locomotive weighing not less than twenty-six tons, two first class passenger and box cars. For the next division of about thirty miles to Eugene City one first class, one first class

locomotive weighing not less than thirty tons, three first class passenger, one baggage and ten each box and platform cars. For the last division of about thirty-five miles two first class locomotives weighting not less than thirty-six tons, four passenger cars twenty box cars, and six platform cars. The contractors shall provide suitable stations and turn outs at various points to be designated by the company at the rate of one for every ten (10) miles water tanks as often as once in every twenty miles where water can conveniently be had such locations to be designated by the company. At the large towns designated as the termini of the different divisions suitable buildings shall be erected for the accommodation of passengers and freight depots of ample size to accommodate the business of the road shall be erected in a substantial and durable manner, also engine houses of a sufficient capacity for the safe housing of all the engines.

The contractors shall erect and furnish suitable machinery for a repair shop at a point designated by the company. The President of the Company and the Engineer of construction shall compose a commission whose approval shall be necessary to the acceptance of the road.

And the party of the second part doth agree to receive payment for the building and equipping said one hundred and fifty miles of railroad in the company's first mortgage railroad bonds payable in twenty years from the date of the same with interest semi-annually. PROVIDED that in case the company, while the road is being constructed is unable from its resources to pay the interest on its bonds issued to the said party of the second part the same shall be payable in the first mortgage bonds

of the Company of regular Series and character at their par value, all said bonds to be secured by a first or bottom mortgage on said one hundred and fifty miles of railroad and on all the rolling stock thereof and such amounts in specie as the company may provide.

And the party of first part hereby promises, covenants and agrees with the party of the second part to pay the sum of five millions two hundred and fifty thousand dollars, receivable at gold or specie value as aforesaid to the party of the second part, and to its assigns for constructing and equipping with rolling stock said railroad from Portland in the State of Oregon to the head of the Willamette Valley or a distance of one hundred and fifty miles, and the party of the first part promises, covenants and agrees with the party of the second part to issue or cause to be issued the first mortgage gold bearing railroad bonds of the Oregon Central Railroad Company, the payment of which shall be secured by a bottom mortgage on said one hundred and fifty miles thereof, and on the rolling stock of the same. Interest on said bonds to be made payable at the rate of seven per cent per annum as aforesaid and the said party of the first part agrees that said bonds shall be issued in such form and sums, and to be endorsed if need be to make the same negotiable and satisfactory, and that the engineers employed are to be paid by the party of the second part and shall be nominated by the party of the second part if they see fit to nominate the same, and that the party of the second part shall be entitled to the earnings of the road until such time as the same is accepted by the Company.

And the party of the first part further agrees to deposit in some safe bank in the State of New York designated by the party of the second part fifteen thousand dollars (\$15,000.00/100) per mile of the amount of said railroad bonds to be delivered to the party of the second part in payment aforesaid as the bill of lading for iron rolling stock and other materials shall from time to time be accepted by such Engineer PROVIDED that the company shall not sell or dispose of their regular first mortgage bonds at less than their par value.

And the party of the first part further agrees to make monthly payments upon the work as approved by the Engineer reserving twenty per cent of the amount of work done each month until the division is accepted by the Commissioners.

And the party of the first part further agrees to use every means in their power to obtain as much cash and money aid from the people of Oregon as is possible for the furtherance of this enterprise.

And the party of the first part further agree to issue two millions of preferred stock of the Oregon Central Railroad Company bearing interest at seven per cent per annum and deliver the same to the party of the second part immediately after the signing of this contract.

And it is further understood and agreed between the parties hereto that the work shall be commenced within one year after the signing of this contract and the whole one hundred and fifty miles completed within five years thereafter.

And it is also understood that the common stock of the O. C. R. R. Co. shall be offered for sale to the people of

Oregon at ten cents on the dollar and at the expiration of six months from the commencement of work on the road, subscriptions at the same rate shall be received from any parties whomsoever for the amounts then remaining unsold.

In testimony whereof we, Geo. L. Woods, President, and Sam'l A. Clarke, secretary, on (end of sixth page) behalf of the Oregon Central Railroad Company, as authorized by the Board of Directors have hereunto affixed our hands and the seal of said Company on the part of said Company party of the first part, to the foregoing contract this the twenty-third day of April, A. D., 1867, at the office of said Company in the City of Salem, Marion County, Oregon.

U. S. Rev. Stamps to the amount of 35 cents cancelled.

Geo. L. Woods,
President,
O. C. R. R. Co.

Sam'l A. Clark,
Secretary,
O. C. R. R. Co.

Seal of O. C. R. R. Co.

And for the party of the first part Albert J. Cook by S. G. Elliott, his Attorney in fact.

Witness

T. R. Brooks
J. H. Parker

COPY of DEPOSITION of JAMES GRINDLEY, taken in the Case of BEN HOLLADAY & C. TEMPLE EMMETT v. SIMON G. ELLIOTT, et al. Pending before

1400. *The Oregon & California Railroad Co.*

J. C. Moreland, Referee, and taken before James B. Bell, Commissioner for the State of Oregon, on the Thirteenth day of January, 1874, and introduced in evidence in Said Cause, and on file in the Supreme Court of the State of Oregon.

Interrogatories to **Grindley & French.**

1. State your age, name and residence.

To the first interrogatory I answer:

My age is forty-five years, name James Gridley, residence Boston, State of Massachusetts.

2. Were you ever in Oregon?

To the second interrogatory I answer:

Yes.

3. When did you go there, in whose company did you go and for what purpose?

To the third interrogatory I answer:

I went there, on or about the fifth of April, 1868. I went in the company of John French, John Bowman & Simon G. Elliott for the purpose to start a railroad in Oregon.

4. Did you know Ben Holladay?

To the fourth interrogatory I answer:

I did know him.

5. Were you engaged at work on the O. C. R. R. Co. during the time you were in Oregon.

To the fifth interrogatory I answer:

I was.

6. Do you remember when Mr. Elliott came to the East during the latter part of 1868 and early 1869.

To the sixth interrogatory I answer:

I did.

7. Whilst Mr. Elliott was absent, state whether you ever had any conversation with Mr. Holladay.

To the seventh interrogatory I answer:

No I did not.

8. Please state all that you can remember as to what Mr. Holladay said in regard to Mr. Elliott to you and to the other men at work in the shop.

To the eighth interrogatory I answer:

I did not hear of any conversation.

9. State whether Mr. Holladay ever declared to you during the absence of Mr. Elliott what his purposes were as to continuing the work along with Mr. Elliott.

To the ninth interrogatory I answer:

He never stated anything to me, personally, in the matter.

Cross interrogatories to be propounded to the witnesses James Gindley and John French.

Cross Int. 1. Where have you resided from your birth to this present time, give the name of the town, county and State.

To the first cross interrogatory I answer:

I have resided in London, England, Boston, Massachusetts, except during the time I was in Oregon.

Cross Int. 2. How long did you reside at each place and between what dates.

To the second cross interrogatory I answer:

Resided in England, seventeen years; in the United States of America, twenty-five years, have traveled for three years.

Cross Int. 3. What occupation did you follow at each

place where you have resided and what is your present occupation?

To the third cross interrogatory I answer:

As a machinist at each place. My present occupation is that of a machinist.

Cross Int. 4. If you have stated that you have ever been in Oregon state who first spoke to you about going to Oregon and when and where that was and under what circumstances.

To the fourth cross interrogatory I answer:

Mr. Simon G. Elliott first spoke to me about going to Oregon in the last part of February, 1867, at South Boston, Massachusetts, to be employed on the Oregon and California Railroad.

Cross Int. 5. When did you first become acquainted with S. G. Elliott and under what circumstances?

To the fifth cross interrogatory I answer:

I first became acquainted with him on or about January, 1867, was introduced to him by Mr. Geo. H. Miller in Mr. Miller's office.

Cross Int. 6. If you have stated that you were engaged at work for the O. C. R. R. during the time you were in Oregon now state particularly how long you worked for said company, at what you worked for said company and at what particular place you worked for said company.

To the sixth cross interrogatory I answer:

I worked for the Oregon Central Railroad Company from April 5th, 1868, to May 30th, 1869, as a machinist. First at Brooklyn, Oregon, on Tebbits farm, second at or near Milwaukee, Oregon.

Cross Int. 7. Give the names of all the persons you can remember who worked with you at each of the places at which you worked in Oregon.

To the seventh cross interrogatory I answer:

At Brooklyn, John Bowman, John French, Henry Davis, Gardner Elliott, Edward Troffitree and others whose names I cannot remember. At Milwaukee, John Bowman, Henry Davis, William Showers, George Arknep, Gardner Elliott, Henry Burch, Edward Troffitree and several others too numerous to mention.

Cross Int. 8. If you have stated that you remember when Elliott came from the East in 1868 or 1869, give now the precise date when he came. Give the month and day of the month.

To the eighth cross interrogatory I answer:

I have not stated that he came East.

Cross Int. 9. If you have stated you had a conversation with Mr. Holladay while Elliott was East, now give year, month and day on which you had such conversation.

To the ninth cross interrogatory I answer:

I have made no such statement.

Cross Int. 10. State particularly when such conversation was had, what town, street, house or building.

To the tenth cross interrogatory I answer:

I have not made no such statement, therefore cannot answer the question.

Cross Int. 11. What time in the day was such conversation had?

To the eleventh cross interrogatory I answer:

The same as the above.

Cross Int. 12. Who was present at such conversation if any one? Give the names and present residences of all persons present at such conversation.

To the twelfth cross interrogatory I answer:

I reply as in previous answers.

Cross Int. 13. What were those persons doing there?

To the thirteenth cross interrogatory I answer:

My answer is the same as above and previous.

Cross Int. 14. Who else heard the conversation you have detailed?

To the fourteenth cross interrogatory I answer:

I have not answered as to any detailed conversation, or stated any.

Cross Int. 15. How did Mr. Holladay come to the place where said conversation was held, who came with him if any one?

To the sixteenth cross interrogatory I answer:

As above and previous.

Cross Int. 16. What other men in the shop did Mr. Holladay talk to?

To the sixteenth cross interrogatory I answer:

I am unable to answer the question.

Cross Int. 17. What other men were at work in the shop at the time of said conversation?

To the seventeenth cross interrogatory I answer:

I have not stated anything about a ship, or conversation.

Cross Int. 18. Was Mr. Holladay's conversation addressed to you at the time refererd to. If not, to whom was it addressed?

To the eighteenth cross interrogatory I answer:

I do not know to what the question alludes to.

Cross Int. 19. If you have stated that Mr. Holladay declared to you in the absence of Mr. Elliott what his purposes were as to continuing the work along with Mr. Elliott now state. State when it was he made such declaration, give the day and year.

To the nineteenth cross interrogatory I answer:

I have not made any such statement.

Cross Int. 20. Where was it, give the name of the town, the state, house, or place?

To the twentieth cross interrogatory I answer:

I reply as above and in previous answers.

Cross Int. 21. Who was present, give the names and present residences of all persons present.

To the twenty-first cross interrogatory I answer:

My answer is the same as above.

Cross Int. 22. How came Mr. Holladay to make such a declaration to you?

To the twenty-second cross interrogatory I answer:

He never made any declaration to me.

Cross Int. 23. What was the precise language he used?

To the twenty-third cross interrogatory I answer:

He never used any language to me.

Cross Int. 24. Are you related to any of the parties to this suit and if so, how are you related?

To the twenty-fourth cross interrogatory I answer:

I am not.

JAMES GRINDLEY.

Subscribed and sworn to before me on the tenth day of

January, A. D. 1874.

JAS. B. BELL,

Commissioner for the State of Oregon.

STATE OF OREGON,

County of Marion.

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that I have compared the foregoing Extracts from the Testimony of Ben Holladay, taken before J. C. Moreland, Referee, in the cause of Ben Holladay and C. Temple Emmett vs. S. G. Elliott, et al, also Exhibit "A" attached to said Deposition, with the originals thereof, and also Extracts from the Deposition of Ben Holladay, taken in the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, in the case of S. G. Elliott, Plaintiff, vs. Ben Holladay, et al., Defendants, taken before James G. Carson, Notary Public, and which Deposition appears as having been offered in evidence in the case of Ben Holladay & C. Temple Emmett vs. S. G. Elliott et al., and which is on file as an Exhibit in such cause in the offices of the Clerk of the Supreme Court, and in my custody. And that said Extracts from the Testimony of Ben Holladay, and said Exhibit "A," taken before J. C. Moreland, Referee, in said cause, and said Extracts taken before James G. Carson, are true and correct Extracts from said Depositions as the same appear in my office and in my custody. And I further certify that I have compared the foregoing copy of Deposition of James Grindley, taken in the case of Ben Holladay and C. Temple Emmett vs. S. G. Elliott et al., before

James B. Bell, Commissioner, and offered in evidence in the trial of said cause, and the same is a true and correct copy of said Deposition and of the whole thereof, now on file in the office of the Clerk of the Supreme Court of the State of Oregon, and in my custody.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of the Supreme Court, this twenty-fifth day of October, 1911.

J. C. MORELAND,
Clerk Supreme Court.

By Arthur S. Benson, Deputy.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

COMPLAINANT'S EXHIBIT 49.

THURSDAY, September 3rd, 1874, 10 o'clock A. M.

Pursuant to the last adjournment the parties appeared at the referee at the Seaside or Clatsop Beach, Clatsop County, Oregon, the plaintiff appearing by J. N. Dolph, Esq., their attorney, and Henry Toomy, Esq., appearing for the defendant, S. G. Elliott, in pursuance of the stipulation and order of August 31, 1874, for the purpose of taking the deposition of the plaintiff Ben Holladay.

Ben Holladay, who has been previously sworn as a witness in this cause, is now examined by Henry Toomy on behalf of the defendant, F. G. Elliott, commencing at 1 o'clock P. M.

Interrogatory 1. In the copy of your deposition taken in San Francisco, which has been admitted by the referee as testimony in this suit, in your reply to question 1168,

you state that you never used the first mortgage bonds of the Oregon Central Railroad—I mean the bonds turned over to your friend by Elliott in the market of San Francisco for the purpose of raising money neither shortly before nor after you brought the suit against Elliott, please inspect that answer and the context, if you choose, touching that particular matter, and state whether or not you still persist in saying that you did not raise money on those bonds, using them as collateral to your note before you brought this suit.

The plaintiffs object to the question as immaterial because in answer to the second succeeding question being interrogatory No. 1170, the witness in the same deposition stated “I used the bonds but whether it was shortly before or shortly after” (referring to the commencement of the suit) “I cannot tell,” and because the question assumes what is not true, namely, that the witness insisted that he did not use the bonds before the commencement of the suit.

(The objection is sustained, to which ruling the defendant, S. G. Elliott excepts). The question is answered subject to the ruling and exception.

The plaintiffs admit that money was received from the French Bank by Ben Holladay & Co. in the manner and at the times and on the security as mentioned and set forth in the deposition of Gustave Mahi on file in this case, and that the sum of \$250,000 was so received by Ben Holladay & Co. on the 29th day of October, 1869, and before the commencement of this suit as stated in said deposition.

Interrogatory 2. At the time you organized the Oregon and California Railroad Company with 200,000 shares at \$100 per share, how many shares did you hold in your own right? (objected to by plaintiff as immaterial and incompetent. The objection is overruled by the Referee, to which the plaintiffs except).

Answer. I have no recollection now.

Interrogatory 3. How many shares did you hold in trust for Milton S. Latham.

Ans. Not a share.

Int. 4. Do you now hold any in trust for Milton S. Latham or does he hold any as Trustee.

Ans. I do not hold a share in trust for him and never did. As to whether he holds any as trustee I do not know without looking at the books. At the organization of the company I knew he did not hold any.

Int. 5. Was not the following the distribution of the shares at the time of the organization.

Ben Holladay	4,996 shares
Ben Holladay, Trustee	120,000 shares
C. Temple Emmitt	50,000 shares
M. S. Latham	10,000 shares
G. W. Weidler	5,000 shares
W. L. Halsey	5,000 shares
Wm. Norris	5,000 shares
C. H. Lewis	One share
J. R. Moores	One share
J. C. Hawthorne	One share
M. Crawford	One share

and do not your private books now show this to have

been exactly the way in which these shares were held. (The plaintiffs object to the question as immaterial, incompetent and not the best evidence. The objection is overruled by the Referee, to which the plaintiffs except.)

Ans. I don't know anything about my private books without looking at them, I know that I did not hold any for Latham and he did not hold any himself to my recollection.

Int. 6. State whether or not Latham was one of the trustees for the bondholders at the time he held those shares referred to in the last and the preceding question, or about the time of the organization of this company. (The plaintiffs object to the question as immaterial and incompetent. The objection is sustained by the referee, to which the defendant, S. G. Elliott excepts.) The question is answered subject to the ruling and exception.

Int. 7. At the time you were interested in the Oregon Central R. R. Co., of Salem, did you hold any shares of that company in trust for Latham. Did he hold any as trustee, did he at any time and does he now hold shares in this Oregon Central R. R. Co. as trustee or otherwise? (The plaintiffs object to the question as incompetent and immaterial and because the deposition of the witness already introduced and other testimony shows that company to have long since been dissolved and the stock cancelled. The objection is overruled, to which ruling the plaintiffs except.)

Ans. He never owned a share of it himself, I never held any of it for him. As to whether he held any as trustee or not I do not know, the books will show.

Int. 8. Was not the following the distribution of the 50,000 shares of the O. C. R. R. Co. during the time of the organization.

Oregon Central R. R. Co.	50,000	shares
Ben Holladay	40	shares
M. S. Latham, trustee.....	26,000	shares
Wm. Norris	20,015	shares
W. L. Halsey	2,501	shares
Geo. W. Weidler	492 $\frac{5}{8}$	shares
C. S. Dyer	81	shares
J. H. Mitchell	One	share
M. Crawford	One	share
Sundry persons	867 $\frac{3}{8}$	shares

I refer to the West Side road (the plaintiffs object to the question as immaterial and incompetent. The objection is sustained, to which the defendant Elliott excepts). (Answer subject to exception).

Int. 9. Do you know if Latham holds or has held as trustee or otherwise any shares in the Oregon Central known as West Side Railway, or do you hold or any one to your knowledge hold any in trust for him or for him. (The question is objected to as incompetent and immaterial by the plaintiffs. The objection is sustained by the referee, to which ruling the plaintiff except.) The question is answered subject to the exception.

Int. 10. You have stated heretofore that you retained copies of the telegrams and letters between Mr. Norris and yourself in reference to the railroad buisness. Will you now state whether or not at this time you are able to recognize upon inspection originals of telegrams here

referred to? (The plaintiffs object to the question as incompetent and immaterial, and because it assumes the witness has stated a fact positively what he had only stated as a supposition and because it is impossible to recognize them unless he shall inspect them. The objection is overruled, to which ruling the plaintiffs except.)

Ans. I could not tell. How can I tell till I look at them?

Int. 11. Who wrote out the originals of those telegrams.

Ans. I don't know, I don't know what telegrams you refer to.

Int. 12. Would you recognize in the originals that may have been sent by yourself. (The plaintiffs object to the question as immaterial and incompetent. The objection is overruled, to which the plaintiffs except.)

Ans. I don't know till I could see it.

Int. 13. Examine original marked "telegram 1," and also marked by the referee "defendant S. G. Elliott's exhibit No. 21," and state whether or not that is in your handwriting and whether or not the same was sent to Norris. (The plaintiffs object to the question as immaterial. The objection is overruled, to which the plaintiffs except.)

Ans. It is in my handwriting, whether it was sent to Norris I don't know. I suppose that if he did receive it he has the original.

Int. 14. Was it written to be sent to him. (The plaintiffs object to the question as immaterial. The objection

is overruled, to which the plaintiffs except).

Ans. I can't tell what it was written for.

Int. 15. Now examine original of telegrams marked telegram 2, and marked by the referee defendant's exhibit 22, and state whether or not you wrote the same and sent it to Mr. Norris. (The plaintiffs object to the question as immaterial and incompetent. The objection is overruled to which the plaintiffs except.)

Ans. I wrote this, whether it was sent to Norris I don't know. I didn't write it all. There are two words there that I didn't write—McAllister and another word. These words telegram No. 2 I didn't write.

Int. 16. Now state what you meant by Gammon and also state what relations Mr. Tevis bore to you at that time; also state who the person spoken of as Felton is and whether he bore at that time any relation to Mr. Elliott and if so, what relation? (The plaintiffs object to the question as incompetent and immaterial. The objection is sustained, to which ruling the defendant S. G. Elliott excepts.) The question is answered subject to the objection.

Int. 17. Now state what it was you meant to have done by Mr. Norris while he talked fight to the person you designated Gammon. (The plaintiffs object to the question as immaterial and incompetent. The objection is sustained, to which ruling the defendant S. G. Elliott excepts. The question is answered subject to the ruling and the exception.)

Int. 18. Now state whether or not that person referred to as Gammon or designated Gammon was your San

Francisco attorney at that time. (The plaintiffs object to the question as incompetent and immaterial. The objection is sustained by the referee, to which ruling the defendant S. G. Elliott, excepts. The question is answered subject to the ruling and exception.)

Int. 19. Have you any doubt in your mind that the person mentioned as Gammon was intended by you to signify Hall McAllister. (The plaintiffs object to the question as incompetent and immaterial, the objection is sustained by the referee, to which ruling the defendant, S. G. Elliott, excepts. The question is answered subject to the ruling and exception.)

Int. 20. Now state whether or not you were then attempting to negotiate a settlement over complications with Mr. Elliott with his attorney, but without his Mr. Elliott's knowledge. (The plaintiffs object to the question as immaterial and incompetent; The objection is sustained, to which ruling the defendant, S. G. Elliott, excepts. The question is answered subject to the exception.)

Int. 21. Now inspect original marked telegram 3 and marked by the referee defendant's exhibit No. 23, and state whether or not the same is in your handwriting, and also whether or not you sent the same to Mr. Halsey? (The plaintiffs object to the question as incompetent and immaterial, the objection is overruled, to which the plaintiffs except.)

Ans. It is my writing, whether it was sent to Mr. Halsey I don't know. Part of it is stricken out and part of it is left in. I don't know what it means whether it

is intended for a telegram or a memorandum. In fact I know nothing in the world about it—that is, I have no recollection. It is my handwriting.

Int. 22. Now state what you mean by the concluding sentence “We cannot afford to continue investigation.”

(The plaintiffs object to the question as immaterial and incompetent. The objection is sustained, to which ruling the defendant S. G. Elliott excepts.) (Answer subject to exception).

Int. 23. Do you attach any meaning whatever to the expression in your handwriting “We cannot afford to continue investigation?”

(The plaintiffs object to the question as immaterial and incompetent. The objection is sustained, to which the defendant S. G. Elliott excepts.)

(The question is answered subject to the exception.)

Int. 24. You had a law suit at that time going on with Mr. Elliott did you not, and investigations were going on into your relations with each other. What other law-suits had you at that time in which investigations were going on that could have any relations with Mr. Halsey?

(The plaintiffs object to the question as immaterial and incompetent, and because it assumes that investigation necessarily refers to a lawsuit. The objection is overruled, to which ruling the plaintiffs except.

Ans. Well, I don't know as I said before that I had anything in which investigations were going on. I had this lawsuit with Elliott and we were taking depositions, or I don't know whether we were or not, as I don't know when this thing was written. There is no date to it.

Int. 25. At on or about what date of time, in your opinion, did you write those exhibits marked 21, 22, 23 and addresses Wm. Norris and W. L. Halsey.

Ans. I don't know. I can't tell. I don't recollect.

Int. 26. Did you or did you not write them sometime in 1871 or after the examination in San Francisco in Elliott's suit against you and others; or after your examination in Portland in your suit against Elliott?

(Plaintiffs object to the question as incompetent and immaterial; the objection is overruled by the referee, to which ruling the plaintiffs except).

Ans. As I have said before, there is no date to it, and I can't tell when these suits were brought, and I can't tell when it was written.

Int. 27. Have you any recollection of any business in which you could have had any necessity to send a telegram upon business involving or bringing into relation Tevis, McAllister, Felton and Elliott unless the business growing out of your complication with Elliott?

(Plaintiffs object to the question as incompetent and immaterial. The objection is overruled by the referee, to which ruling the plaintiffs except.)

Ans. Well, I had no other lawsuit with anybody except with Elliott of any amount I believe. There were no investigations going on except taking depositions, in that. It is natural that I should have them all in except Tevis. McAllister was my lawyer, and it is natural I should bring him in, but I don't know what Tevis had to do with it. That is what bothers me.

Int. 28. Do you mean that you could have no other

business bringing into relation the three names, or that your bringing them into relation with each other would grow out of your lawsuit with Elliott and none other?

(Plaintiffs object to the question as incompetent and immaterial. The objection is overruled, to which ruling the plaintiffs except.)

Ans. No other business than that.

Int. 29. Then as your lawsuit with Elliott or the examinations growing out of his lawsuits with you took place since December 1870, the telegrams or exhibits already produced in evidence were written were they not since the commencement of those suits?

(The plaintiffs object to the question as immaterial and incompetent. The objection is overruled, to which ruling the plaintiffs except).

Ans. Yes.

Int. 30. Now look again at telegram No. 2 addressed Wm. Norris. Does or does not the relation of Tevis' name bring to you the significance or meaning of his connection with the Elliott complication, I refer to the expressions "You must talk fight to Gammon," overlined "**Mc-Allister** while Tevis' overlined "**investment** is negotiating with Felton. Tevis must get Felton's promise of strict confidence."

(The plaintiffs object to the question as incompetent and immaterial. The objection is sustained, to which ruling the defendant S. G. Elliott excepts. The question is answered subject to the ruling and exception.)

Int. 31. Do you attach any meaning to the expression "while Tevis is negotiating with Felton, Tevis must

get Felton's promise of strict confidence." Does it mean any other than what the words in their ordinary acceptance would convey?

(The defendant S. G. Elliott now offers the papers marked as defendant's exhibits 21, 22 and 23, in evidence.

The plaintiffs object to their being received in evidence because the testimony shows that they are the private property of Ben Holladay, and are not in the possession of the defendant Elliott for the purpose of being offered in evidence, but must have been stolen from Ben Holladay.

The referee takes the matter under consideration until after the deposition of W. L. Halsey and Wm. Norris are taken, when on August 24, 1875, it is ordered by the referee that said objections to the exhibits as evidence are sustained, to which ruling defendant S. G. Elliott excepts.

Int. 32. Do you recollect the amount or approximate of cost of actual construction of the whole railroad to Roseburg.

(The plaintiffs object to the question as immaterial and incompetent. The objection is overruled, to which the plaintiffs except.)

Ans. No. I do not. They are in the books.

Int. 33. Did the question of cost ever become a question of reference or conversation between you and others?

(The plaintiffs object to the question as immaterial and incompetent. The objection is overruled, to which the plaintiffs except.)

Ans. I don't know whether it has or not. It may or it may not.

Int. 34. Can you say whether the road construction cost two, three, four, five or six millions from your connection with it?

(The plaintiffs object to the question as immaterial and incompetent. The objection is overruled, to which the plaintiffs except.)

Ans. My approximation would be that it cost between five and six millions in gold for the rolling stock and construction.

Int. 35. In answer to your question 999, in your deposition taken in San Francisco, you stated the total amount due you for railroad purposes, prior to borrowing money on Oregon Central bonds, was \$140,000. In your first answers to questions of this day you admitted having received \$250,000 on the 28th of October, 1869, and prior to commencing suit against Elliott you had then before commencing suit been repaid all the money due to you and had some surplus on hand of the money obtained on Elliott's securities had you not?

(The plaintiffs object to the question because it states that which is not correct; the answer to question 999 merely assents to the statement of counsel that he had advanced \$140,000 of his own means prior to Oct. 29, 1869, and because it appears by interrogatory 228 that the North Pacific Transportation Company advanced \$213,682, prior to Oct. 5, 1869, C. Temple Emmitt, \$19,000 and Mr. Holladay personally \$141,000 and that the expenditures to December 25, was \$800,000 or upwards, as appears by answer to interrogatory 274, this suit was commenced on the 4th day of November, therefore the al-

legtaion that Mr. Holladay has stated that the amount due to him before borrowing money on the Oregon Central R. R. bonds was only \$140,000 is correct.)

(The objection is overruled, to which ruling the plaintiffs except.)

Ans. Well, I am not prepared to answer the question until I look at the books.

Now at this time it is ordered that a recess be had until seven o'clock this evening.

J. C. Moreland, Referee.

Thursday, Sept. 3, 1874. Seven o'clock P. M.

Pursuant to adjournment, the parties appeared as of this day before recess. The examination of Ben Holladay is resumed.

Int. 36. In answer to question 431 of the same deposition of yours, you stated the bonds were sold at sixty cents all commission paid. Did you by this or do you now mean that all the bonds of the Oregon and California were sold at this price, having been accepted as you stated in other testimony (the plaintiffs object to the question as immaterial. The objection is overruled, to which the plaintiffs except.)

Ans. The bonds were all sold for sixty cents, less two and a half per cent commissions.

Int. 37. You have then received the money for the whole amount of bonds, \$10,800,000 sold at sixty cents less commissions paid of two and a half per cent.

(The question is objected to as immaterial and because it is a statement of a conclusion not warranted by the testimony. The objection is overruled, to which the plaintiffs except.)

Ans. The railroad company has received the money for them.

Int. 38. What money of your own have you expended on the railroad between the 5th of October and the 29th, 1869?

Ans. I can't tell now.

Int. 39. About what amount do you think has been expended on the road between those dates?

Ans. I can't tell, I have nothing here to refer to, to tell.

Int. 40. Do you know whether you expended any of your own money on the road during those three weeks in addition to the \$140,000 or \$141,000?

Ans. I know I did but how much I can't tell.

Int. 41. Was it \$50,000 or \$5,000 or more than fifty or more than either?

Ans. I can't tell. I know that I expended money, but how much I can't tell.

Int. 42. In your testimony of today you stated that to your knowledge Mr. Latham held stock in the Oregon Central, and you believed in the Oregon and California in trust for other people on account of some business transactions. Please state for whom he holds that stock?

(The plaintiffs object to the question as immaterial. The objection is overruled, to which the plaintiffs except.)

Ans. He holds the stock but for whom I cannot tell.

Int. 43. Do you know whether or not or have you heard that Mr. Latham ever made any profit out of or growing out of the bona transactions of the Oregon Cen-

tral or the Oregon and California Railroads? I mean in addition to the bank commission of two and a half per cent, and if so what was the amount of that profit or about the amount in your recollection?

(The plaintiffs object to the question as immaterial and incompetent. The objection is sustained, to which defendant S. G. Elliott excepts. The question is answered subject to the ruling and exception.)

Int. 44. Did you recommend or select the present site of construction for Clackamas Railway bridge?

Ans. I never recommended or selected it. At the time the bridge was being constructed there was some controversy about it being constructed above the present site, by Mr. Brooks the engineer. Mr. Elliott had some doubts about the piers—about the foundation, and thought that the present site was cheaper and more secure. I agreed with him about the foundation, but the approaches to the present bridge being reversed course I didn't like, and for that reason I thought the other was a more direct and better crossing, though not so good a foundation, though I was no railroad man. Not being an engineer I did not insist on any point or select any point.

Int. 45. Did you give your opinion in favor of either bridge?

Ans. No sir.

Int. 46. Did Mr. Brooks or Mr. Elliott express any dissent or protest or remonstrate with you for selecting the present site and insisting on the construction there where it is now?

Ans. They did not.

Int. 47. In answer to questions 229 and 235, of your printed deposition, before referred to, you stated that of the amount of about \$800,000 expended by Ben Holladay and Company on railroad account, and borrowed from various sources before the surrender of the Cooke contract, a part of the \$800,000 the greater part had been borrowed not on the Oregon Central bonds, but on your own individual security, please state now what amount or approximate, did you obtain and when and where for railroad account on your individual security.

(The plaintiffs object to the question as immaterial and not correct or true in so far as it recites the answer to question 225. The objection is overruled, to which the plaintiffs except.)

Ans. Well, I couldn't either state or approximate anything about it. Mr. Norris was there, and he had my power of attorney and he attended to all these matters for me.

Int. 48. You do not know then, do you, or recollect, that you ever raised any sum, of any amount you can think of, for railroad purposes on your individual security, by Mr. Norris or by yourself?

Ans. I know we did borrow money on my own securities, but at this time I can't tell from whom or the particular amount.

Int. 49. In answer to questions 1040 and 1041, 1042 and 1043, you stated having borrowed through Norris \$500,000 or thereabout from the French Bank, and from the Bank of British Columbia about \$100,000 on Oregon

Central bonds, now how do you explain your statement that you borrowed a greater portion on your individual security than on the collateral of Oregon Central bonds, when you cannot show or do not recollect any amount borrowed for railroad account on your own individual security?

(The plaintiffs object to the question as not being a fair statement of the facts in testimony.)

Ans. As I before stated, I have no recollection about the matter. As to these Oregon Central bonds, I never considered them of any value. They always had my note and generally other securities. I can't tell about it at this date without consultations with Mr. Norris and explanations from him.

Int. 50. What other securities than your note had the French Savings Bank, except the Oregon Central bonds?

Ans. I cannot tell, not having made the transactions myself.

Int. 51. Do you admit that deposition of the president of the French Bank in which he states having made you loans to the amount of \$500,000 or thereabouts on the collaterals of the Oregon Central bonds.

(The plaintiffs object to the question as incompletent and immaterial. The objection is sustained, to which the defendant S. G. Elliott excepts.)

The question is answered subject to the exception and ruling.

Int. 52. Then you admit \$500,000 advanced on Central bonds by the French Bank?

Ans. I can't admit it so far as I am concerned, as I don't know anything about it.

Int. 53. In answer to 234 you stated that you borrowed this \$800,000 on your own individual notes with the bonds of the company as collateral security. In answer to 1040 you stated having borrowed from one bank, the French Society, \$500,000, is that statement correct?

Ans. Which, that I borrowed the money?

Int. 54. Yes.

Ans. Well, I presume it is.

Int. 55. Then your answer to 52 is not correct is it in which you state that you can't admit that you know anything about it?

(The question is objected to by plaintiffs as immaterial and because it is not a correct statement of what he said. The objection is sustained, to which ruling the defendant S. G. Elliott excepts.)

(The question is answered subject to the ruling and exception.)

Int. 56. Then what you stated in 1040 you did not know?

(Question withdrawn.)

(The direct examination is now closed.)

CROSS EXAMINATION.

Cross Int. 1. State if these exhibits Nos. 21, 22 and 23 are in your handwriting, except as stated by you, how, if you know, they came out of your possession?

Ans. I have no idea how they came out. The only way they could have got out was that they were stolen from the office—taken away from there.

Cross Int. 2. Are you acquainted with a man by the

name of Edward Bolton?

Ans. I don't recollect the name.

Cross Int. 3. State whether or not in the year 1868, at your office in Portland you had a conversation with Edward Bolton?

Ans. No sir, I never had a conversation with him at my office.

It is now ordered that this cause be adjourned until tomorrow morning, Friday, September 4th, 1874, at 12 o'clock M. to resume this deposition.

J. C. Moreland, Referee.

Friday, September 4, 1874, Twelve o'clock M.

Pursuant to the adjournment of last evening, the parties appeared, plaintiff by J. N. Dolph, Esq., and the defendant, S. G. Elliott by Henry Toomy, Esq., special counsel, Mr. L. L. Bullock also being present.

The cross examination of Ben Holladay resumed:

Cross Int. 4. State whether or not in any such conversation or at any time you claimed or stated as a reason for the discharge of said Bolton, or otherwise, that "he was a friend of Elliott's and you would not have any such on the road" or anything to that effect.

Ans. I never discharged any man, and I never told him I would do it because he was a friend of Elliott's—Bolton or any one else.

Cros Int. 5. State whether or not you ever to any one made any such remark or any remark indicating that you were dissatisfied with Elliott or his employees prior to October 4, 1869?

Ans. I never did.

Cross Int. 6. State whether or not S. G. Elliott was present at the meeting of September 7, 1869, of the Board of Directors of the Oregon Central Railroad Company, when some 39,930 shares of stock was ordered issued to Ben Holladay & Co.?

(This question is objected to by the attorney of defendant Elliott for the reason that it is not proper cross examination, and because it was part of plaintiff's case upon his testimony in chief, and because it is not proper rebuttal. The objection is overruled, to which the defendant Elliott excepts.)

Ans. He was.

Cross Int. 7. State the object of procuring the transfer of said stock, and whether or not S. G. Elliott did not consent to the same and assist in procuring the same?

(Same objection by defendant Elliott's attorney as to cross Int. No. 6, and because it calls for a mere expression of opinion and not for a fact.)

(Objection sustained as to the object of the transfer but overruled as to remainder.)

Ans. He did. The object was to have it all in one bunch—all together. They all consented to it. They were all there, and thought that would be the better plan.

Cross Int. 8. If you stated anything to the Board of Directors or to the Directors individually to the effect that you would not proceed with the work unless certain stock was surrendered, state what stock that was, and the object of making that statement?

(Same objection by defendant Elliott's attorney as to cross Int. No. 6, and because it calls for a mere confession of opinion and not a fact.)

(The objection is overruled, as to what stock it was, but sustained as to the object—to which ruling both parties except.

Ans. That was the stock that was in the hands of the old Board of Directors. The object in making that statement was to induce them to give up the stock. We did not want to go on unless we could get all the stock that we could. These men had no interest whatever, and I believe they all surrendered the stock.

Cross Int. 9. Do you now recollect what was paid to the Oregon Central Railroad Company in addition to the obligations assumed by them as stockholders, for the transfer of said stock and was not this indebtedness of the company assumed and paid by Ben Holladay & Co. amounting to some \$35,000 or \$40,000?

(Same objection by same as to cross Int. No. 6. Overruled.)

Ans. The indebtedness was paid by Ben Holladay & Co.

Cross Int. 10. State whether or not in returning to Portland or Salem from that meeting or elsewhere, or ever prior to October 4, 1869, you stated to A. F. Hedges, referring to Elliott, "I would have nothing to do with him. He is a damned rascal. We must get rid of him, and you must help us do it" or words to that effect.

(Same objection to same as to cross Int. No. 6. Overruled.)

Ans. I never made any such statement to him.

Cross Int. 11. State whether or not on or about the 15th day of September, 1869, or at any other time prior to October 4, 1869, at your office in the City of Portland or elsewhere, you had a conversation with John Bowman, in the presence of Samuel Bowman, or otherwise, in which you state, "To be frank with you, I have concluded to get rid of the Elliott gang and am going to discharge all that have not been discharged from Elliott down," or words to that effect?

Ans. I never made any such statement to him or to anybody else.

Cross Int. 12. If you ever had any conversation with John Bowman in regard to his being employed by Ben Holladay & Co., state when and where that conversation occurred and the occasion of it as near as you can recollect?

Ans. I can't think just when the conversation occurred. I know that he and I had a conversation about his being discharged and the result of it was I told him we did not want him. We thought he was not a competent man to do the business.

Cross Int. 13. Mr. Elliott, Mr. Cushman, Mr. Brooks and Mr. Mason have given testimony relating to a conversation alleged to have occurred on the bank of the Clackamas River concerning the location of the Clackamas bridge at a time when you and Mr. Weidler were up the road. State whether or not on that occasion or at any other time, in the presence of the parties named or either of them, or otherwise, you gave orders for Mr.

Brooks to locate the bridge at the point where it now crosses, or whether or not Mr. Elliott protested against any such order or stated to you that he would have nothing to do with it or take any responsibility.

Ans. Mr. Elliott never made any protest or anything of the kind, and I never gave any orders where the bridge should be built or selected a place where it should be built. I did not know where it ought to be built. I am not a competent person to judge.

Cross Int. 14. State whether or not in any such conversation or ever in the presence of Mr. Robert Mason, or any one else, you told Brooks and Elliott to change the line of the road and put the bridge where it now is across the Clackamas River?

Ans. I never told them any such thing. Brooks and Elliott built the bridge just where they wanted to, I presume.

Cross Int. 15. State whether or not Mr. Elliott in any such conversation or ever said to you, referring to the location of said bridge, "Mr. Holladay, it can't be done without a heavy curve. We will have to approach the bridge on a ten degree curve" or words to that effect.

Ans. He never told me that it could not be done. He may have told me about the curves. We talked about the curves. I objected to the present location on account of the curves.

Cross Int. 16. State whether or not in reply to Mr. Elliott you said, "Damn it, the Central Pacific and other roads have lots of ten degree curves; can't you cross the bridge on a straight line with fifty feet tangent on each

side," or words to that effect?

Ans. I never said any such words.

Cross Int. 17. State whether or not at said place, or elsewhere, in any conversation about the location of said bridge, in the presence of Z. Cushman or otherwise, you told Mr. Elliott "Right here I want the bridge," or words to that effect?

Ans. I never did.

Cross Int. 18. State who controlled the location of said bridge, and whether or not you knew or professed to know anything about such matters.

By deft. Elliott's attorney objected to as not proper cross examination. (Objection withdrawn.)

Ans. It was controlled by Mr. Brooks and Mr. Elliott. I did not know anything about it.

Cross Int. 19. State whether or not Elliott replied to you, that you must take the responsibility as he (Elliott) could not approve of it, or words to that effect.

Ans. Never.

Cross. Int. 20. State whether or not you in such conversation, or ever, objected to the location of the bridge below the County bridge, and gave as a reason that if the County bridge was to wash away it would carry away the railroad bridge, or words to that effect.

Ans. I don't recollect of any such words.

Cross Int. 21. State whether or not in any such conversation Mr. Elliott said that he disapproved the location of the bridge at that point, and if you insisted on building it there you would have to assume and have all the responsibility, or words to that effect.

Ans. He never did. The location and construction of the bridge was left entirely to the engineer, Mr. Brooks and Mr. Elliott both professing to be engineers. I only advised with them about the location of the bridge. We consulted together about it.

Cross Int. 22. State whether or not you assumed to control or dictate in regard to the location of said bridge; or whether or not you did not leave it entirely to the chief engineer and superintendent.

Ans. I left it to the chief engineer and superintendent.

Cross Int. 23. State whether or not you had a conversation with Robert Mason as to the additional force of men added or to be added to the grading forces after Elliott was discharged.

Ans. I think this man Mason was in charge of the grading and I talked with both him and Mr. Brooks about whether they had men enough to complete the road, and they both said they didn't have enough. They commenced to increase the force before Mr. Kinair arrived; after he came he had full charge.

Cross Int. 24. State whether or not in any such conversation you stated to said Mason, "God damn Elliott! I want you to understand that I am the boss. I am the man that pays you the money—pay no more attention to what Elliott says to you. I pay you the money, no other man,"—or words to that effect.

Ans. I never said any such words to him. And I never had anything to do with Mason until after Elliott left, when I commenced inquiring into it.

Cross Int. 25. State whether or not in said conversa-

tion or ever, you asked Mason if he could do the grading in time with the force he had or he told you that he could, or he told you that the gang he was working was seventy men, or you asked him if he could not work a hundred men; or he said that he could but did not need them to finish the work in time; or Anderson asked Mason if he had not better send down another gang of Chinamen, or you answered Anderson, "I want you to understand, Mr. Anderson, that Mr. Mason will do the grading and you do the trestle work; he has done one-half in four days, it looks a little curious if he can't do the rest in six weeks."

Ans. I never had any such conversation in detail. I only asked him if he had men enough, and he said they did not. Anderson said the same thing. They all said so, Brooks, Anderson and Mason.

Deft. Elliott's attorney moves to strike out all of answer beginning "They all said," to and inclusive of the terminal word "Mason," because the same is not responsive to the question.

(Motion sustained, to which the plaintiffs except.)

Cross Int. 26. State at whose instance Mr. Perrin came to Oregon prior to the purchase of his interest in the Cooke contracts and state whether or not he came at your instance to make any examination for you.

By deft. Elliott's attorney objected to as not proper cross examination and not proper rebuttal. Objection withdrawn.

Ans. He never did. I don't know at whose instance he came. He never did from mine.

Cross Int. 27. State whether or not on said Perrin's

return from Oregon, or ever, he made or attempted to make any particular or accurate statement of the condition of the Oregon Central Railroad, or the work done, amount expended, or anything more than a general statement of the prospects of the country and railroad.

(By deft. Elliott's attorney same objection as to Cross Int. No. 26.)

(Objection withdrawn.)

Ans. That is all he made, just a general statement about what was up here, about the railroad and about the country.

Cross Int. 28. State whether or not at or prior to making the purchase of the Perrine interest, or at any other time, you proposed to Mr. Perrin to return to Oregon, and that you would retain a tenth interest in the road for him, or proposed to him to become superintendent of the road at a salary or otherwise; or proposed getting possession of the road by purchasing claims against Elliott.

By deft. Elliott's attorney same objection as to Cross Int. No. 26. Objection withdrawn.

Ans. I never did. I never made any such proposition to him.

Cross Int. 29. State whether or not Perrin informed you that Elliott objected to his selling out to you.

By deft. Elliott's attorney same objection as to Cross Int. No. 26—Objection withdrawn.

Ans. He never made any such statement.

Cross Int. 30. State whether or not you ever said to S. A. Clarke shortly after he ceased to be secretary of the Oregon Central Railroad Company, or at any other

time, that you wanted a man as secretary of the company that you could do as you pleased with—or used any language equivalent to that?

Ans. I never used any language equivalent to it, or anything like it.

Cross Int. 31. State whether or not S. B. Parrish prior to your forming a co-partnership of Ben Holladay & Co., or ever, informed you of the amount of work done on the Oregon Central Railroad, or amount expended or materials or machinery on hand, or condition of the Cooke contracts?

(By deft. Elliott's attorney same objection as to Cross Int. No. 26. Objection withdrawn.)

Ans. He never did.

Cross Int. 32. State whether or not when work was resumed in 1869, on the Oregon Central Railroad, you ignored Elliott altogether or at all in the management of the work, or assumed entire or any control of the work, or treated Elliott in a discourteous or disrespectful manner, or in any way interfered with his efforts in the construction of the road, or interfered with all or anything Elliott proposed to do, or interfered at all further than to advise in matters brought to your attention.

Ans. I only advised with him when he brought matters to my attention. He had entire control of the road. I never treated him amiss or in any other way than as one gentleman treats another.

Cross Int. 33. State whether or not you required the employees upon the road to report directly to you while Elliott was superintendent, or gave orders to T. R. Brooks

while he acted as chief engineer of the road, or required him to report to you as chief engineer?

Ans. Never in the world except when they were together. We sometimes talked over matters, but as to any formal reports, I never required it of them.

Cross Int. 34. State whether or not you had charge of the work on said road prior to October 4, 1869, or T. R. Brooks received orders from you.

(By deft. Elliott's attorney objected to as not proper cross examination and as not being proper rebuttal—overruled—to which the defendant S. G. Elliott excepts.)

Ans. I never had any charge of it at all. All the orders that Brooks received was of course through Mr. Elliott. While Mr. Elliott was there he had charge of Mr. Brooks and the road.

Cross Int. 35. State whether or not the number of hands to be employed on the work on said road after the resumption of work in 1869 was limited by you to 200 or any other number, and state what if anything was said by you about what was done or the force to be employed, in 1869, in the construction of the first 20 miles of the road.

Ans. It never was limited by me to any number except I told them to employ enough men to finish the work in December.

Cross Int. 36. State whether or not you in any manner interfered with the hands employed on said road during the absence of Mr. Elliott in the winter of 1868 and 1869.

Ans. I don't recollect about that. I don't recollect

who had charge of the men; whoever had charge of the men when I was here, I consulted with them.

Cross Int. 37. State whether or not in any conversation with Mr. Elliott, upon the "Oriflamme" in Portland, the first time you met Elliott in Portland, you stated to him that he should not find you as bad a man as he had evidently surmised.

Ans. No sir, I never had any such talk. I never told him such a thing.

Cross Int. 38. State whether or not you expressed yourself as being surprised, from information derived from Mr. Perrin and Mr. Parrish, that the amount of work Mr. Elliott has accomplished for the limited amount of money expended, or whether you had received such information from Mr. Perrin or Mr. Parrish, or referred to the fact that you were already informed by Mr. Perrin or Mr. Parrish of the amount of work done, and the condition of affairs, or whether you professed to be informed, or was informed, as to the amount of work done or the amount of money expended, and the condition of affairs prior to receiving such information from Mr. Elliott.

Ans. I couldn't express any surprise at what I had seen, for I had never seen the work. My surprise was predicated upon their statements, if I expressed any. I had not received such information, except Perrin may have told me generally. Mr. Parrish never made any statement about the work. Mr. Perrin made a statement in San Francisco to me verbally about what was being done.

Cross Int. 39. State whether or not at such conversa-

tion on the “Oriflamme” you asked Mr. Elliott if the statement which Mr. Perrin had made to you was correct in relation to the condition of materials, bonds, etc., and he answered in the affirmative that it was.

Ans. I don’t recollect. I may have done so. I cannot recollect the conversation in detail.

Cross Int. 40. State whether or not you did not, prior to and on the day of the formation of the partnership of Ben Hlladay & Co., question Mr. Elliott as to the condition of the road, amount expended, machinery on hand, indebtedness of A. J. Cooke & Co., probable cost of grading the road, amount of bonds, and stocks held, etc.

Ans. Yes sir, of course I consulted with him about the condition of affairs.

Cross Int. 41. State whether or not, on the 12th of September, 1868, at the time of the formation of the partnership, of Ben Holladay & Co., you asked Elliott if the facts represented from Perrine to you were correct and truthful.

Ans. I don’t recollect of using those words. I should think I made all necessary inquiry.

Cross Int. 42. State whether or not in the conversation on the 12th of September, 1868, you said, Mr. Elliott, I have been unfortunate in money matters recently in San Francisco, and it is not convenient for me to pay all this money—referring to the amount Elliott claimed he had put into the road, now. We can get a few thousand dollars if you require it till we get back to San Francisco, and all that money will then be paid to you, or anything to that effect.

Ans. No sir, I did not make any such statement to him. At the time the arrangement was made he said he did not want the money—he wanted only a part of it. I never stated to him that I had been unfortunate in money matters, because it was not so. He said he did not want all the money, that he would draw it as he wanted it.

Cross Int. 43. State whether or not in the conversation at the office of A. J. Cooke & Co. September 12, 1868, between yourself, Emmitt and Elliott, anything was said by Elliott or to Elliott about securing him or paying him for his time prior to that time.

Ans. The arrangement we made with him included everything that was due to him up to that time, according to his statement.

Cross Int. 44. State whether or not in said conversation or at any other time, Mr. Emmitt said in your presence to Mr. Elliott, your money will be safe for you, and in the meantime if you desire it, Mr. Holladay's note will be given you for the money if you will wait. We will go back to San Francisco in three or four weeks—it shall not exceed four weeks—and if your money shall be forthcoming if you will wait, or words to that effect.

Ans. I recollect no such conversation.

Cross Int. 45. State whether or not Mr. Elliott's representation to you of the cost of grading the road to Salem was qualified by excepting the right of way at Oregon City?

Ans. No sir, there was no qualification about it.

Cross Int. 46. State whether or not when you asked him the question as to what it would cost to prepare the

grade for iron and ties to Salem, he stated to you "Mr. Holladay, as Mr. Emmitt is aware, we have not the right of way in Oregon City; there is a question there not disposed of, but I can state this, that beyond that point of difficulty the grading can be done for \$40,000, and state that he did say in answer to your question about the cost

Ans. He told me that the grading could be done for the sum of \$40,000. I have no recollection of his telling me everything about the right of way at Oregon City.

Cross Int. 47. State whether or not, in answer to a statement or question of yours "Mr. Elliott, is it possible you can grade that much for \$40,000," Mr. Elliott said, "Mr. Holladay, I will qualify that for perhaps that might lead to a misunderstanding, I will state that aside from the whole of this expensive work at Oregon City, the whole of the line from Portland to the end of the 150 miles can be completed and put in running order for \$16,000 a mile in gold coin"; or as to whether you said, "Mr. Elliott, you cannot do it for that, or as to whether he replied to you, "Mr. Holladay, I will take the contract for that if you will give me a margin for a profit," or whether you said then, "Put your property in your wife's name, by God, before you take such a contract as that," or as to whether he in any manner qualified his statement that the road could be completed for \$40,000 to Salem.

Ans. There was no such words said to me. There was no qualification about it. He said he could do the grading for \$40,000 to Salem. There was no qualification about Oregon City—nothing of the kind.

Cross Int. 48. State whether or not at the time of the

formation of the partnership of Ben Holladay & Co. or prior, Mr. Elliott, in reply to a question by you, if the representation of Mr. Perrin was correct, about there being machinery enough for all the shops, said that it was not so in full, but that the machinery that we required would not cost but a very few dollars, or stated to you that we required some additional machinery for the wood shop and a small amount for the machine shop.

Ans. Well, I don't recollect such conversation in detail. I recollect distinctly he said he had machinery enough in the shops to complete the road to the head of the valley. As to any little additions, I don't recollect. He may have said it,—I don't recollect.

Cross Int. 49. State whether or not Mr. Perrin in San Francisco had furnished you with a list and memorandum of the machinery on hand or whether you knew about that except from Elliott's statements.

Ans. All I knew about it was that Elliott said to me Perrin never furnished me any statement.

Cross Int. 50. Mr. Elliott in answer to Interrogatory 182, says, "I came into the office and was surprised to hear from him that he had appointed or re-elected Mr. Anderson, and sent him up to take charge of the work above Salem, and this side of Salem, in the vicinity. I expressed my surprise at the time, and he said of course Mr. Elliott, you will control Mr. Anderson. I have been told he is a competent person and a good man and I have sent him up there, for that purpose." Did you have that conversation and what was there about the employment of Mr. Anderson?

I recollect no such conversation but I knew this, that I never put Mr. Anderson there or any one else, except by the consent of Mr. Elliott.

Cross Int. 51. Mr. Elliott in answer to Interrogatory 207, states "that upon my arrival in San Francisco in June, the last part of June, 1869, I called on Mr. Holladay at his office, and while there a telegram came in. Mr. Norris was in the office; He says: "Here, this is what we have been expecting; Mr. Halsey telegraphs for \$20,000 gold; must have it"; and he says to me, I could not raise it to save my soul; there is not a man—I have not a friend in San Francisco, that would let me have the money to save me; he told me subsequently in relation to some other matters, that he could not furnish me with \$1000. I had to procure means of my own to come to Oregon from San Francisco." State whether or not that conversation occurred.

Ans. Not a word of it is true. I never told him on earth that I could not raise \$20,000.

Cross Int. 52. Mr. Elliott, in answer to interrogatory 221, states that upon his return from the Atlantic States in June, 1869, the number of men employed on the road was by direction of Mr. Holladay limited to 200, and at various places in his deposition repeats the same statement, and that you had given as a reason that until Mr. Emmitt negotiated the bonds the money that you could use in the road must be confined to the earnings of the North Pacific Transportation Company or your steamers—state whether or not that is correct?

Ans. I never had any such conversation with Mr. El-

liott. I never limited the number of men to be employed on the road. I never told him that all the money I could put into the road was from the earnings of the North Pacific Transportation Company or steamships.

Cross Int. 53. State whether or not you notified Mr. Elliott one evening at your house in Portland or elsewhere in August 1869, or at any other time, that Mr. Emmitt had failed in his negotiations; that the thing was a failure, and that it was very humiliating to you, and requested Mr. Elliott to have Mr. Brooks and Mr. Anderson to come to your office as you wanted to inform them that the work must stop—or anything to that effect.

Ans. I never had any such conversation. I never told him anything of the kind.

Cross Int. 54. Mr. Elliott, in answer to Cross Int. 1024, referring to the same matter, says: “The next day Mr. Holladay censured me for speaking to them about stopping the work, and said I could not keep secrets; accused me of not keeping secrets, &c; to which I told him that the order was I understood him was that the work was to stop, and I thought that he desired to give them the orders himself. He says, No, Mr. Elliott, I should have permitted you to give those orders * * * he censured me the next time I saw him saying that the only man that could keep a secret that he had in his employ was Mr. Weidler; that myself and Cole could never keep anything.” State whether or not that conversation occurred.

Ans. It did not.

Cross Int. 55. State whether or not you set the men at

work yourself in 1869, or ever except through Mr. Elliott, and whether or not Mr. Elliott did not have the privilege of employing all the men he desired to complete the first 20 miles within the time limited by the Act of Congress, or whether there was any lack of means in 1869 to pay all the men that were needed for that purpose or additional men had they been hired, or whether you ever stated to Mr. Elliott there was any lack of means.

Ans. Never. He did **no**. Means were all secured to finish the road up to the twenty mile post.

Cross Int. 56. State whether or not upon the arrival of Mr. Elliott in the Spring of 1869, you informed him that Mr. Emmitt had not succeeded in negotiating the bonds, and that therefore the work must either be stopped or delayed, or anything to that effect.

Ans. I did not.

Cross Int. 57. Mr. Elliott in answer to Cross Interrogatory 1176, states in substance that you stated to him that you had to work upon the earnings of the steamers, and when the pay-rolls came in in August that you came to him very much exercised, and wanted to know how it was that over \$12,000 or about \$12,000 perhaps a little less that month, and said you was not prepared for it, that the amount was a great deal larger than he had estimated, &c, and that he referred to the fact that you had given directions to Mr. Medlez (?) to put on more hands, &c. State whether or not that conversation occurred, and what your recollection is about it, if you have any.

Ans. Well, in the first place I never told him that the

road depended upon the earnings of the steamships, and I hadn't given orders to Medley that I recollect of to increase the force. If I had it was through him. I have no recollections of grumbling at the pay rolls. I don't think that they were very heavy—\$11,000 or \$12,000. I have no recollection of grumbling about them.

Cross Int. 58. Mr. Elliott in answer to direct interrogatories 224, 225, 226 and 227 states substantially that 80 men that had been hired by Mr. Wulbur in the summer of 1869, were discharged in pursuance of a promise made to you, and details a conversation alleged to have occurred with you upon that subject, in which he states that your objections were very decided at first to keeping the men at work, but afterwards that you considered that he should let them go on condition that he should promise to discharge them at a certain time. State whether or not you objected to the employment of them or exacted a condition that they should be discharged or objected to the employment of any men.

Ans. I never objected to the employment of any men for the completion of the road. As to these Chinamen, I don't recollect about them. If I wanted them discharged it was for some other reason than wanting the expenses of the road reduced. I never exacted a promise that they should be discharged, and instead of objecting to the employment of men, I insisted on their employing men. I never discharged or employed men myself. It was done always by the man in charge.

Cross Int. 59. State whether or not you assigned as a reason for the discharge of such men or any men that you had not means to pay such a large force of men.

Ans. No sir, I never made any statement of the kind.

Cross Int. 60. In answer to Interrogatory 234, Mr. Elliott states "I called at Mr. Holladay's house one evening and he stated to me, says he,—“Mr. Elliott, you are very sarcastic!” To which I answered that I was not aware of anything that I had said or done that would lead him to accuse me of anything of that kind. He said, yes, you wrote a letter in which you said inasmuch as the negotiations had failed, Mr. Holladay would have to furnish the means. I stated to him I did not remember having written such a letter at that time. He said, yes, you wrote such a letter to Mr. Brooks. He says, I can build this railroad, and I want you to understand it, without your assistance or that of Mr. Brooks; to which I remarked that I thought I had some rights, and I presumed the courts would maintain them. He says, Mr. Elliott, I do not fear either of the courts in Oregon.” State whether or not such a conversation was had.

Ans. I never had it in the world.

Cross Int. 61. State whether or not in 1869, or at any other time, you assumed control of the work, gave directions to the foreman, in opposition to Mr. Elliott's protest and that of Brooks, in relation to the amount of work to be done by the saw mills or to Mr. Brooks in relation to the location of the line around the basin of the People's Transportation Company, or to Medley to confine himself to a certain number of men, or took the responsibility of directing Mr. Brooks for the change of location for the Clackamas River bridge, or took control and direction of the manner of supplies.

(By deft. Elliott's attorney.—So much of Cross Int. No. 61 as refers to location of Clackamas River bridge, including the words "change of location for the Clackamas River bridge," is objected to as not proper cross examination, as not proper rebuttal, and because the whole matter thereabout has been gone into on this examination. The objection is overruled, to which defendant Elliott excepts.)

Ans. No sir, I never did.

Cross Int. 62. State whether or not you stated to Mr. Elliott in Oregon City in 1869, that you had not the money and it was not possible for you to furnish the means to relieve Mr. Ireland.

Ans. No, I never did.

(Close of the cross examination of Ben Holladay.)

Answers of Ben Holladay to questions asked but overruled by the Referee, and answered subject to the ruling and exception:—

To direct interrogatory No. 1.—

I have no recollection of the question or my answer to it without looking at it. Without looking at it I have no recollection about it. (Questions 1168, 1169, and 1170, of said depositions are read to the witness who states I have no more recollection of the matter now than I did before.

To direct interrogatory No. 6.—

He was one of the trustees for the bondholders. but he did not own any stock so far as I know.

To direct interrogatory No. 8.—

I have no recollection as to the distribution of the shares or how it was held. It is a matter that is there on the books.

To direct Int. 9.—

I never did, and do not now hold one share in trust for Latham, or otherwise, and I do not know of any one who does. I think Latham does (I know he does) hold stock in trust for other people. I mean he holds it as trustee for other people in business transactions. I refer to the West Side road—the road that Dyer was secretary of. (The answer is objected to by Deft. Elliott as not an answer to the question.)

To direct Int. 16.—

I don't know, but from the writing above it I presume it means McAllister. I don't know what the paper means. I had no relations with Mr. Tevis at that time except that of a friend. I don't know what the word Felton refers to. I know John B. Felton. It may refer to him, or it may refer to somebody else. I don't know. John B. Felton was the attorney of Elliott, as I understood it. He bore no relation to me except that of an opposing lawyer—and never has borne any other.

To direct Int. 17.—

I don't know. I can't tell. I don't know what it means.

To direct Int. 18.—

Hall McAllister was my attorney at that time, and his name being above them, I presume it is meant for him, but I don't know.

To direct Int. 19.—

I have no doubt of it, for the reason that the word

McAllister is put above it.

To direct Int. 20.—

I don't know what negotiation it means, but from Mr. Felton's name being there, I suppose it must refer to this lawsuit, but what was to be done I don't know, whether it was the settlement of the case or the postponement of taking depositions, I never had any negotiations with Felton in relation to this case except once, and that was here in Oregon. That was when they were all here together.

To direct Int. 22.—

I have no idea what it alludes to. I have not the remotest idea what the memorandum alludes to.

To direct Int. 23.—As I stated before, I have no idea what it means. But there is one thing sure, it don't mean that I couldn't continue an investigation. But I don't know what investigation it means. It must mean something about an investigation because it is so written.

To direct Int. 30.—

It would seem that Tevis' name being used in the connection that it is, with McAllister, Felton and Elliott, that he had something to do with this case, but what I don't know.

To direct Int. 31.—

I don't know what they mean. I suppose they mean what is said, but I don't know what is meant. I mean that the words "confidence" and "negotiation," I suppose that they mean what they do in ordinary conversation.

To direct Int. 43.—

I know of nothing at all he has made.

To direct Int. 51.—

(Complainant's Exhibit 51)

IN THE CIRCUIT COURT OF THE U. S.

For the District of Oregon,

For the County of

JOHN NIGHTINGALE and S. G. ELLIOTT,

Plaintiffs,

vs.

THE OREGON CENTRAL RAILROAD CO. of SALEM,

and THE OREGON & CALIFORNIA R. R. CO.,

Defendants.

Deposition of Ben Holladay, witness on behalf of the Defendants in the above entitled cause taken before me R. J. Meigs the commissioner named in the attached commission and Clerk of the Supreme Court in and for District of Columbia on the 2d day of October, A. D. 1878, at his office at Washington in said District.

Said Ben Holladay being first duly sworn in answer to the Direct Interrogatories attached to said Commission in their order, testified as follows:

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

S. G. Elliott,

Portland.

Dear Sir:

On our purchase of this date of A. J. Cook and A. J. Cook & Co., of the pending contracts with the Oregon Central Railroad for the construction of the Railroad from Portland to the California line it is understood that we are to pay you the money furnished by you to the firm

of A. J. Cook & Co. and standing to your credit on their books.

This money is stated by you to amount to about twenty-one thousand dollars.

When the accounts are finally made up and the balances correctly ascertained you will be entitled to our obligation for the correct amount.

Respectfully yours,

BEN HOLLADAY & CO.

Exhibit A.

IN CIRCUIT COURT OF THE UNITED STATES

For the District of Oregon.

JOHN NIGHTINGALE and S. G. ELLIOTT,

Complainants,

vs.

THE OREGON CENTRAL RAILROAD CO. OF SA-
LEM, and THE OREGON AND CALIFORNIA
RAILROAD CO.,

Defendants.

Direct Interrogatories—attached to a commission on which was taken the Deposition of Ben Holladay in the above entitled suit and propounded to said Ben Holladay.

Int. 1. State your name, age and residence.

Answer. Ben Holladay; age, 59, residence now in Washington City, D. C.

Int. 2. State how long you have been acquainted with complainant, S. G. Elliott.

A. I first met him in Portland, Oregon, in September, 1868.

Int. 3. State whether or not you had any knowledge,

either from your own personal acquaintance or otherwise, of the capacity or qualifications of complainant S. G. Elliott as an engineer or as a superintendent of construction of a railroad, prior to September 12, 1868, except from his statements to you, and C. Temple Emmet.

A. Only from his own and Mr. Emmet's statements.

Int. 4. State what representations, if any, complainant S. G. Elliott made to you and C. Temple Emmet, or either of you, in reference to his qualifications as an engineer and superintendent of the construction of a railroad shortly prior to September 12, 1868, and prior to the time of the formation of the articles of copartnership between Mr. Emmet himself and yourself under the firm name of Ben Holladay & Co.

A. He told me he was a railroad engineer, and had practical knowledge of railroad construction.

Int. 5. State whether or not you relied on these representations at the time they were made, and acted upon them in the formation of the firm and the purchase of the contracts.

A. I did, most assuredly.

Int. 6. State from whom the proposals first came to form the copartnership of Ben Holladay & Co.

A. It was after general consultation. I do not now remember who first suggested it.

Int. 7. State what representation complainant S. G. Elliott made to yourself and Mr. Emmet, or either of you, prior to the formation of the copartnership of Ben Holladay & Co., in September, 1868, with reference to the value of such contracts, and the amount of bonds and stocks

held by the firm of A. J. Cook & Co., and what power did he, Elliott, say he had to sell and transfer the same?

A. He represented them as being valuable, and said he had full power to make sales, transfers, etc.

Int. 8. State what representations if any, the said S. G. Elliott made to you and Emmet, or either of you, prior to and shortly before you entered into copartnership with him, and took a transfer of said contracts in September, 1868, in reference to the amount of grading done at that time on the Oregon Central Railroad, and in reference to the amount of money it would require to finish the road from Portland to Salem, ready for the iron rails.

A. I cannot remember the amount of expenditures, represented by him. He assured us that \$40,000 would fully complete the roadbed, ready for the ties to Salem.

Int. 9. State whether either yourself or Mr. Emmet had ever gone over the road, the entire length to Salem from Portland or any considerable portion of it previous to entering into such copartnership, or made, or had any opportunity of making a personal examination of the amount and character of the work done on such road at that time, or to be done.

A. We made but little examination. I relied on Elliott's representation, as Mr. Emmet believed him honest and truthful.

Int. 10. State what the fact was as afterwards ascertained by you with reference to the grading.

A. That he had made a false statement.

Int. 11. State whether or not you and Emmet relied and acted upon the representations of S. G. Elliott in ref-

erence to his capacity as a railroad builder, and in reference to the amount of work done in forming said contract of copartnership, and in taking the assignemnt of said contracts.

A. We did, most positively.

Int. 12. State what amount of the non-assessable preferred interest-bearing stocks of the company he did not have control of, and which he did not turn over to the new firm.

A. I cannot, without reference to books in Portland.

Int. 13. State what were the general qualifications of complainant S. G. Elliott.

A. Wholly unfit for any branch of the business.

Int. 14. State whether or not there was any lack of money in the summer or fall of 1869 necessary to carry on the work of constructing the road with dispatch for the purpose of completing the first twenty miles within the time fixed by the Act of Congress.

A. There was no lack of money.

Int. 15. State what was the effect upon the firm of Ben Holladay & Co. of the incompetency and willful wrongs of S. G. Elliott, as stated by you.

A. Necessarily very damaging.

Int. 16. State the damage to defendants by reason of the wrongful acts of the complainant S. G. Elliott, as stated by you in this deposition.

A. Very great. What amount I cannot now name.

Int. 17. State who furnished all the money for carrying on the construction of the road by the firm of Ben Holladay & Co.

A. The North Pacific Transportation Co., and myself.

Int. 18. State if you were, in October, 1869, and have been since that time acquainted with the value of railroad bonds, and stocks generally, in the money markets of the United States and Europe, and especially of those of the Oregon Central Railroad Company in October, 1869, or at any time since then.

A. I was not acquainted with the value of railroad securities—but I know Oregon Central Railroad had no value.

Int. 19. State whether you were acquainted with the real value in October, 1869, or any time since, of the contracts, original and supplemental, between the Oregon Central Railroad Company and A. J. Cook, and A. J. Cook & Co., and which were then held by Ben Holladay & Co. If so, state it.

A. They were of no value.

Int. 20. What would have been the result to the firm of Ben Holladay & Co. financially as to profit or loss in the event that they had been compelled to go on and construct the Oregon Central Railroad under said contracts, either for the first one hundred and fifty miles, or through the whole state.

A. Financial ruin.

Int. 21. State what became of these contracts.

A. I do not know—I suppose they are in the Portland office.

Int. 22. State fully all the property owned by the firm of Ben Holladay & Co. at the date of the cancellation of said contracts and the dissolution of the Oregon Central Railroad Company, and its value.

A. I cannot recollect the value.

Int. 23. State when the firm of Ben Holladay & Co. practically ceased to do business as such firm.

A. I cannot tell date without reference.

Int. 24. State what has become of the interests, which the complainant S. G. Elliott, Gardner Elliott and T. R. Brooks, had in the contracts referred to, in the firm of Ben Holladay & Co.

A. I cannot tell without reference to railroad books.

Int. 25. State fully all the property owned by the firm of Ben Holladay & Co. at the time of the sale and transfer of the property of said firm to the Oregon Central Railroad Company and its value.

A. I cannot, without reference.

Int. 26. State what became of the stock of the Oregon Central Railroad Company of Salem held by the firm of Ben Holladay & Co. at the time of the dissolution of said Railroad Company.

A. The books of the Company will explain; there is nothing I know; the books are in Portland, I suppose.

Int. 27. State some of the matters if any existed which improved the value of the Bonds of the Oregon Central Railroad Company.

A. There is nothing I know of.

Int. 28. State if you remember whether any litigation was pending in the courts at and before the surrender and cancellation of said bonds and contracts concerning the right of said Company to the use of its corporate name or concerning the legality of its organization, and if so state what litigation.

A. I think there was a suit, but the character of which I do not remember.

Int. 29. State some of the reasons which actuated you in surrendering in connection with Mr. Emmet the stock of the Oregon Central Railroad Company, the bonds of that Company, and the contracts with that Company, for the construction of its road which were held by Ben Holladay & Co.

A. It was impossible to go on with the work, under the contract and organization.

Int. 30. State if you know where complainant S. G. Elliott then was, and whether or not he was then in Oregon and if not, under what circumstances he had left the State and about how long before; and what attention he had given to the affairs of the firm from the time he left the State.

A. I do not know his whereabouts, as he left the state in a hurry; he had nothing to do with the firm after he left.

Int. 31. State whether or not the amount received by Ben Holladay & Co. for and upon the surrender of said contracts and bonds and the transfer of their property was the exact amount of outlays and expenditures of said firm under said contracts and on account of said Oregon Central Railroad Company.

A. I think it was, but I cannot name the exact amount without reference.

Int. 32. State to what Company or to whom the property of the firm of Ben Holladay & Co. was transferred and from whom and by what arrangement the consideration was received.

A. To the Oregon and California Railroad I think; I cannot recollect the remainder of the question.

Int. 33. State what representations, if any, were made to you by the complainant S. G. Elliott at or prior to the formation of the firm of Ben Holladay & Co. as to the character and amount of machinery on hand, owned by A. J. Cook & Co.

A. That with small addition, it would be ample to do all the work for passenger, freight flat cars, repairs, and construction to the head of the Willamette Valley.

Int. 34. State whether or not in the purchase of said contracts for the construction of the said Oregon Central Railroad you relied upon said representations.

A. Solely—entirely—exclusively.

Int. 35. State what the fact was as to the amount and character of machinery as afterwards ascertained by you.

A. It was wholly inadequate for the work as he represented.

Int. 36. State what the agreement was between yourself, C. Temple Emmet, and complainant S. G. Elliott if any, as to the refunding to him of money paid out by said Elliott for the firm of A. J. Cook & Co.

A. I cannot recollect; the agreement will show.

Int. 37. Look at the paper hereto attached marked Exhibit "A" of your deposition, and state whether or not that paper correctly sets forth said agreement.

A. It does.

Int. 38. State what became of the interest of T. R. Brooks in the co-partnership of Ben Holladay & Co.

A. The books will show.

Int. 39. State what became of the interest of Gardner Elliott in the co-partnership agreement of Ben Holladay

& Co., and if you answer that you purchased the same, state what consideration was paid said Elliott for it.

A. I think I purchased it; I do not remember the price paid; the books will explain.

Int. 40. State whether or not all the debts of the firm of Ben Holladay & Co. were paid, and if so, by whom and when.

A. I cannot answer fully without reference to books.

Int. 41. State whether or not all the amount advanced by C. Temple Emmet to the firm of Ben Holladay & Co. was refunded to him and if so by whom and out of what fund.

A. I do not remember the amount, if any.

Int. 42. State whether or not at any time you purchased an interest in said construction contract between the Oregon Central Railroad Company of Salem and A. J. Cook and A. J. Cook & Co. from one N. P. Perrine and if so state when you purchased said interest, what interest you purchased, and what consideration you paid for such interest.

A. I purchased an interest, but cannot remember the amount of interest, or how much was paid.

Int 43. State whether or not T. R. Brooks and Gardner Elliott held interests in said contracts at the time of the formation of the firm of Ben Holladay & Co. and if so what became of their interests.

A. I do not recollect; the books will show.

Int. 44. State the circumstances under which said Brooks and Gardner Elliott became interested in the firm of Ben Holladay & Co.

A. I do not know.

Int. 45. State fully the reasons which made it necessary in your judgment to discharge Complainant as General Superintendent of the Oregon Central Railroad Co.

A. Because of his utter incompetency.

Int. 46. State generally what efforts it required after the discharge of said Elliott as General Superintendent to complete the first twenty miles of road within the time required by Act of Congress.

A. By Elliott's misrepresentation and failure to do what he had the facilities to accomplish, it required an increase of men with additonal expenditures—working under great disadvantages from bad weather and high water; causing great loss to the Company; and it was only completed within the last hour limited under the Act of Congress giving the land grant.

Int. 47. State whether or not there was any profit and if so what to the firm of Ben Holladay & Co., upon closing out its business, selling its property and cancelling said contracts after paying the indebtedness of said firm and repaying the moneys advanced through you and Emmet for the Oregon Central Railroad Co., and in the construction of the road under said contracts.

A. No—on the contrary there was great loss.

Int. 48. If you have not already done so in this deposition please now state full ythe reasons which made it necessary in your judgment to surrender said Cook contracts and have them cancelled, and to sell the property of said firm of Ben Holladay & Co. to the Oregon Central Railroad Company.

A. It was impossible to build the road under the Cook contract.

Int. 49. If you have not already done so, please state whether or not reasons existed and if so, what they were for the dissolution of the Oregon Central Railroad Company.

A. We could not go on with the work for the reason of the complications heretofore stated by me.

Int. 50. Please state as near as you can the amount of money advanced by you to the firm of Ben Holladay & Co. prior to Nov. 4th, 1869.

A. I cannot without reference to the books; I think I have stated in a former deposition.

Int. 51. State whether any moneys were advanced to said firm by the North Pacific Transportation Co., prior to Nov. 4th, 1869, and if so, about what amount.

A. There was; but I cannot recollect the amount.

Int. 52. State what connection you then had with said North Pacific Transportation Co. and on whose credits said moneys had been advanced.

A. I was President, owning nearly seven-eighths of the stock.

Int. 53. State about the sum total expended by the firm of Ben Holladay & Co. prior to the cancellation of the construction contracts, in the construction of the road, and on account of the Oregon Central Railroad Company including indebtedness of A. J. Cook & Co. paid by Ben Holladay & Co.

A. I cannot, without reference.

Int. 54. State whether or not complainant S. G. Elliott furnished any portion of this sum.

A. Not a dollar.

Int. 55. By whom was the Oregon and California Rail-

road constructed from the end of the first twenty miles?

A. Under direction of Chief Engineer Henry Thielson, and nearly all by contract.

Int. 56. State whether or not all the moneys received upon the sale of the securities and other property of the Oregon and California Railroad Company was not received by said Company, and disbursed by said Company.

A. It was.

Int. 57. State whether or not the complainant S. G. Elliott was present at the meeting of September 7th, 1869, of the Board of Directors of the Oregon Central Railroad Company, when some 39,930 shares of stock was ordered issued to Ben Holladay & Co.

A. He was.

Int. 58. State the object of procuring the transfer of said stock and whether or not said S. G. Elliott did not consent to the same, and assist in procuring the same.

A. The object was to get clear of complications, and have all the stock together. Elliott was present, and assisted in getting the stock.

Int. 59. If you made any statements to the Board of Directors or to the Directors individually to induce the surrender of certain stock, state what that stock was, and the object of procuring its surrender.

A. I stated my fears that we could not go on with the work; we had a right to the stock, as it cost them but little, if anything.

Int. 60. Do you now recollect what was paid to the Oregon Central Railroad Company in addition to the obligations assumed by them as stockholders for the transfer

of said stock and as a consideration of said surrender was not the indebtedness of the Company paid by Ben Holladay & Co., amounting to \$35,000 or \$40,000?

A. I cannot recollect the amount paid by Ben Holladay & Co.

Int. 61. State who located the Clackamas bridge where it was first built?

A. I did not order it built there.

Int. 62. State whether or not you ever gave orders to Mr. Brooks or any other person to locate the bridge at the point where it was built, or whether Mr. Elliott protested against any such order or stated to you that he would have nothing to do with it or take any responsibility, or make any objection whatever.

A. I never gave an order as to its location—Elliott never protested to me about its location, or anything else.

Int. 63. State who controlled the location of the Clackamas Bridge and whether or not you knew or professed to know anything about such matters.

A. The Chief Engineer with Elliott—I had nothing to do with it; I was not a competent judge, while Elliott professed to be, and to know all about bridge building.

Int. 64. State whether or not you assumed to control or dictate in regard to the location of the Clackamas bridge and **and** whether or not you did not leave it entirely to the Chief Engineer and Superintendent.

A. No, I left it entirely to Brooks, Chief Engineer, and Elliott.

Int. 65. State whether or not when work was resumed in 1869, on the Oregon Central Railroad you ignored Mr. Elliott altogether, or at all in the management of the

work or assumed entire or any control of the work, or treated Elliott in a discourteous manner or in any way interfered at all further than to advise in matters brought to your attention?

A. I never did.

Int. 66. State whether or not you required the employees on the road to report direct to you, while Elliott was Superintendent, or gave orders to Brooks to report to you as Chief Engineer?

A. Never.

Int. 67. State whether or not you took charge of said road prior to Oct. 4th, 1869.

A. I did not.

Int. 68. State whether or not the number of hands to be employed upon the work on said road in 1869 was limited by you to 200 or any other number and what if anything did you tell Elliott about the force which should be employed?

A. The number of men was not limited; I repeatedly reminded Elliott that he must have ample force to insure completion of the 20 miles of road, to secure the land grant; I told him I was fearful his force was insufficient; his reply was "I have all I want, and will have no trouble; we have plenty of time, and it will be completed."

Int. 69. State whether or not in any conversation with Mr. Elliott upon the Oriflamme in Portland, the first time you met Elliott in Portland, you stated to him: He should not find you as bad a man as he had evidently surmised, or anything to that effect?

A. No such conversation took place.

Int. 70. State whether or not you expressed yourself as being surprised from information derived from Mr. Perrine and Mr. Parrish at the amount of work Mr. Elliott had accomplished for the limited amount of money expended or whether you had received such information from Mr. Perrine and Mr. Parrish or whether you professed to be informed or was informed as to the amount of money expended and the condition of affairs prior to receiving such information from Mr. Elliott?

A. I never expressed myself in that way—the only information was from Elliott.

Int. 71. State whether or not at such conversation on the Oriflamme, or ever you asked Mr. Elliott if the statement which Mr. Perrine had made to you in relation to material, bonds, etc., was correct, or he answered in the affirmative that it was.

A. I do not recollect.

Int. 72. State whether or not you did not prior to, and on the day of the formation of the partnership of Ben Holladay & Co., question Mr. Elliott as to the condition of the road, amount expended, machinery on hand, indebtedness of A. J. Cook & Co., probable cost of grading the road, amount of bonds and stocks held, &c.

A. I did.

Int. 73. State whether or not in the conversation on the 12th of Sept., 1868, you said, Mr. Elliott, I have been unfortunate in my money matters recently in San Francisco, and it is not convenient for me to pay all this money, referring to the amount Elliott claimed he had put into the road now. We can get a few thousand dol-

lars if you require it till we get back to San Francisco, and all that money will then be paid to you, or anything to that effect.

A. No conversation took place.

Int. 74. State whether or not in said or any conversation anything was said by Elliott or to Elliott about securing him or paying him for his time prior to that time.

A. No such conversation at that time, or any other.

Int. 75. State whether or not in said conversation or at any other time Mr. Emmet said in your presence to Mr. Elliott "Your money will be safe for you and in the meantime if you desire it Mr. Holladay's note will be given you for the money if you will wait. We will go back to San Francisco in three or four weeks, it shall not exceed four weeks, and your money shall be forthcoming if you will wait," or anything to that effect.

A. Mr. Emmet said nothing of the kind in my presence.

Int. 76. State whether Mr. Elliott's representation to you of the cost of grading the road was qualified by excepting the right of way at Oregon City.

A. There was no qualification made by him.

Int. 77. State whether or not Mr. Elliott said to you "Mr. Holladay, as Mr. Emmet knows we have not the right of way at Oregon City; there is a question there not disposed of, but I can state this beyond that point of difficulty, the grading can be done for \$40,000, and state what he did say about the cost of grading from there to Salem.

A. He stated unqualifiedly that the grading could be completed ready for the ties to Salem for \$40,000.

Int. 78. State whether or not in answer to a statement or question of yours "Mr. Elliott is it possible you can grade that much for \$40,000?" Mr. Elliott said, "Mr. Holladay I will qualify that for perhaps that might lead to a misunderstanding. I will state that aside from the whole of this expensive work at Oregon City the whole of the line from Portland to the end of the 150 miles can be completed and put in running order for \$16,000 a mile in gold coin, or as to whether you said Mr. Elliott you cannot do it for that, or as to whether he replied to you Mr. Holladay I will take the contract for that if you will give me a margin for a profit or as to whether you said then "Put your property in your wife's name By God! before you take such a contract as that," or as to whether Elliott in any manner qualified his statement that the road could be made ready for the rails to Salem for \$40,000.

A. I positively state, no such conversation passed between us.

Int. 79. State whether or not Mr. Perrine had furnished you with a list or memorandum of machinery on hand or whether you knew anything about the amount of (or?) character of machinery on hand except from Elliott.

A. He did not. All the information I had came from Elliott.

Int. 80. State whether or not Mr. Elliott ever expressed surprise to you that Mr. Anderson had been em-

ployed to take charge of the work, and you said Mr. Elliott you will of course control Mr. Anderson. I have been told he is a competent man or anything of that kind, and state whether you employed Mr. Anderson or any one else without Mr. Elliott's consent.

A. No such conversation took place. I never employed a man without consulting Elliott, nor without his consent.

Int. 81. State whether or not in June, 1869, or at any other time when a telegram came to you while Mr. Elliott was in your office in San Francisco, you said here this is just what we have been expecting. Mr. Halsey telegraphs for \$20,000 gold, must have it. I could not raise it to save my soul, there is not a man, I have not a friend in San Francisco that would let me have the money to save me or anything to that effect, or whether any such conversation took place.

A. No such thing took place; it is **false**.

Int. 82. State whether or not you subsequently or ever told him you could not furnish him (Elliott) with \$1000, or anything of that kind.

A. I never told him anything of the kind.

Int. 83. State whether or not you ever told Mr. Elliott either upon his return from the Atlantic states in 1869 or any other occasion that the number of men to be employed upon the road be limited to 200, or gave as a reason for limiting the number of men to be employed that until Mr. Emmet negotiated the bonds the money that you could use in the road must be confined to the earnings of the North Pacific Transportation Company or your steamers or anything to that effect and whether any such conversation occurred.

A. I never told him anything of the kind. It is all false.

Int. 84. State whether or not you notified Mr. Elliott one evening at your house in Portland or elsewhere in August, 1869, or at any other time that Mr. Emmet had failed in his negotiations, that the thing was a failure, that it was very humiliating to you and requested Mr. Elliott to have Mr. Brooks and Mr. Anderson to come to your office as you wanted to inform them that the work must stop or anything to that effect.

A. I did not.

Int. 85. State whether or not the next day or ever you censured him for speaking to them about stopping work and said he Elliott could not keep a secret or whether he replied that the order was I understood you that the work was to stop and he thought he desired to give the orders himself, or you said no Mr. Elliott, I should have permitted you to give orders yourself, or as to whether you said the only man who could keep a secret was Weidler, that he and Cole could never keep anything. State whether any such conversation took place.

A. No such conversation ever took place. It is all false.

Int. 86. State whether or not you set the men at work yourself in 1869 or ever except through Mr. Elliott, and whether or not Mr. Elliott did not have the privilege of employing all the men he desired to complete the first 20 miles within the time required by the Act of Congress, or whether there was any lack of means in 1869 to pay all the men that were needed for that purpose or additional

men had they been hired or whether you ever stated to Mr. Elliott there was any lack of means.

A. Elliott had full authority to employ all the men he wanted, to complete the 20 miles. There was **no lack** of funds to pay men, or for anything else.

Int. 87. State whether or not upon the arrival of Mr. Elliott in San Francisco, in the spring of 1869, you informed him that Mr. Emmet had not succeeded in negotiating the bonds, and that therefore the work must either be stopped or delayed or anything to that effect.

A. No such conversation ever took place.

Int. 88. State whether or not you ever stated to Mr. Elliot that you had to work upon the earnings of the steamers or whether when the pay rolls for August, 1869, came in or ever you went to him very much excited or otherwise and wanted to know how it was that over \$12,000 was owing for that month or stated that you was not prepared for it or that the amount was a great deal larger than you had estimated or as to whether Elliott referred to the fact that you had given directions to Mr. Medley to put on more hands or anything to that effect. State whether or not any such conversation occurred.

A. I never stated it.

Int. 89. State whether or not you stated to Mr. Elliott in Oregon City or elsewhere in 1869 or at any other time that you had not the money and it was not possible for you to furnish means to release Mr. Ireland.

A. I never told him so—it is false.

Int. 90. State whether or not in 1869 or at any other time you assumed control of the work gave directions to the foremen in opposition to Mr. Elliott's protest or

otherwise in relation to the work to be done by the said Mills or to Mr. Brooks in relation to the location of the line around the basin of The People's Transportation Co. or to Medley to confine himself to a certain number of men or took the responsibility of directing Mr. Brooks for the change of the location of the Clackamas bridge or took control and direction of the matter of supplies.

(SEAL)

A. I never gave directions on the works, or interfered with Elliott in any way.

Int. 91. State whether or not the 80 men that had been employed by Mr. Weidler in the summer of 1869 were discharged in pursuance of a promise made to you or as to whether you objected at first or at any time to keeping the men at work or consented to let them go on, on condition that Elliott should promise to discharge them at a certain time.

A. I made no objection to employing men, or exacted any promise.

Int. 92. State whether or not you assigned as a reason for discharging such men or any men that you had not means to pay such a large force of men.

A. I never assigned any such reason.

Int. 93. State whether or not you ever stated to Mr. Elliott "You are very sarcastic" or whether Mr. Elliott replied, I am not aware of anything that I have said or done that would lead him to accuse me of anything of that kind, or whether you said Yes you wrote a letter in which you said inasmuch as the negotiations had failed Mr. Holladay will have to furnish the means, or as to whether he stated to you that he did not remember having

written such a letter or as to whether you said Yes, you wrote such a letter to Mr. Brooks, or whether you said to him, I can build the railroad and I want you to understand it without your assistance or that of Mr. Brooks, or as to whether he Elliott remarked that he thought he had some rights and he presumed the Courts would maintain them, or as to whether you said, Mr. Elliott, I do not fear either of the Courts in Oregon State, whether any such conversation occurred either literally or in substance.

(SEAL)

A. It is all false.

Int 94. Do you know or can you set forth anything matter or anything which may be a benefit or advantage to the parties at issue in this cause or either of them or that may be material to the subject of this your examination or the matters in question in this cause?

If you can set forth the same fully and at large in your answer.

A. I cannot now think of anything else.

BEN HOLLADAY.

District of Columbia.—ss.

I, R. J. Meigs, the Commissioner named in the attached and foregoing Commission and Clerk of the Supreme Court in and for said District, hereby certify that on the 2d day of October, A. D. 1878, between the hours of 7 o'clock P. M. and 8 o'clock P. M. of said day at his office at Washington in said District, the foregoing Deposition of Ben Holladay, Witness on behalf of the Defendants in the above entitled cause, was taken by me in pursuance of and by authority of the foregoing and attached Commission.

That before taking the said Deposition said witness was duly sworn by me to tell the truth, the whole truth, and nothing but the truth.

I further certify that at said time and place I propounded to said witness the Interrogatories attached to said Commission in their order, and reduced their answers thereto to writing, and then carefully read to said witness said Deposition, Interrogatories and answers, which were admitted by him to be correct and subscribed by him in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

(SEAL)

R. J. MEIGS,

Commissioner and Clerk of Sup. Court in and for the District of Columbia in the District of Columbia.

By M. A. Clancy, Assistant Clerk.

(U. S. Int. Rev. Stamp Five Cents)

DEPOSITION BY COMMISSION

of Ben Holladay of

Washington, D. C.

Filed Oct. 15, 1879

R. H. Lamson, Clerk.

UNITED STATES OF AMERICA,

District of Oregon.—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Deposition of Ben Holladay, in cause No. 134, John Nightengale and S. G. Elliott, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the

original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this October 7, A. D. 1911.

G. H. MARSH,
Clerk.

By
Deputy Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

COMPLAINANT'S EXHIBIT 52

*In the Circuit Court of the United States for the
Ninth CirCuit, District of Oregon.*

JOHN NIGHTINGALE & SIMON G. ELLIOTT,
Plaintiffs,

vs

THE OREGON CENTRAL RAILROAD COMPANY
and THE OREGON AND CALIFORNIA
RAILROAD COMPANY,

Defendants.

UNITED STATES OF AMERICA,
District of Oregon.—ss.

I, Ben Holladay, being first duly sworn, do depose and say upon my solemn oath. That I am one of the stockholders of the Oregon and California Railroad Comapny, Defendant herein . That the whole capital

stock of such corporation is twenty millions of dollars. That I am at the present time the owner and holder of 134,996 shares of such capital stock, that is to say, I am now and was at the commencement of this suit the bona fide owner and holder of 134,996 shares of the capital stock of the said Oregon and California Railroad Company, defendant herein, also that I was at the commencement of this suit and still am one of the Directors of such Oregon and California Railroad, and I was also at the commencement of this suit, and am now the President of the Board of Directors thereof. And I do deny that the plaintiff John Nightingale is now, or has been since the 18th day of December, A. D. 1870, or ever at any time has been the bona fide holder or owner or the holder or owner at all of 3700 shares or any other number of shares of the capital stock of the Oregon Central Railroad Company defendant herein. I deny that the alleged assignors of the plaintiff Nightingale were on the 30 day of June 1867 or were ever at any time, or any of them the owners of thirty seven hundred shares of the capital stock of said defendant The Oregon Central Railroad Company, or of any number of shares of its capital stock. I deny that 3700 shares of the capital stock of the defendant The Oregon Central Railroad Company or any number of such shares were ever duly assigned to plaintiff Nightingale. I deny that the plaintiff Simon G. Elliott was on the 12th day of November 1869, or ever has been at any time since that date or is now the holder or owner bona fide or otherwise of sixteen thousand (16000) shares of the capital stock of the Oregon Central Railroad Company, or any number of shares

whatever of said capital stock of the defendant the Oregon Central Railroad Company. I deny that a large number of shares or any number of shares of the capital stock of said Oregon Central Railroad Company deft. herein, was prior to September 7th, 1869, or ever at any time duly or legally issued or delivered to A. J. Cook or to A. J. Cook & Company. I deny that the directors of the defendant the Oregon Central Railroad Company who were such directors on or about September 7th, 1869, or ever at any time or any of them were tools or confederates of one Ben Holladay, or of this affiant or that they in all things did my bidding. I deny that said defendant the Oregon Central Railroad Company did on or about the 7th day of September, A. D. 1869, or ever at any time without any consideration paid therefor acting by or through its then directors or merely nominal or otherwise cause to be issued or delivered to this affiant or said Ben Holladay, in the name of Ben Holladay and Company or otherwise 39,930 shares of its capital stock, or any number of shares of its capital stock. I admit and state the fact to be and so it is that on or about the 7th day of September A. D. 1869 said Oregon Central Railroad Company, Defendant herein did acting by and through its then Board of Directors, each and all of whom acted fairly and in good faith and according to their best judgment, and without any confederation collusion or fraud and for a valuable and adequate consideration cause to be issued and delivered to this affiant and in his name 39,930 shares of the capital stock of the

defendant The Oregon Central Railroad Company. I deny that on and prior or on or prior to the 7th day of Dec. 1869 or since I had by various devices or contrivances or by any device or contrivance become possessed of all the shares or that there was standing in my name and in the names of any confederates of mine all the shares of the capital stock of said Oregon Central Railroad Company except the number of shares particularly enumerated and specified in Schedule "F" attached to Complaint herein. I deny that I ever combined or confederated with the directors of the said Oregon Central Railroad Company or any of them, or that I did on or about September 7th 1869, assume to have the control of the agreements or contracts between the Oregon Cantral Railroad Company and A. J. Cook and A. J. Cook and Co. or that I did on or about the 7th day of September, 1869, surrender the same to the said Oregon Central Railroad Company, or cancel the same, or that I did undertake then to control the same, or that I did ever cancel the same except as hereinafter stated. I deny that I did either personally or in conjunction with any associates or confederates or with said directors of C. Temple Emmett of any of them on or about the 7th day of September 1869, or at any other time nominally surrender to said Oregon Central Railroad Company to be cancelled or did attempt to & nominally cancel all or any of the shares of the capital stock of said Oregon Central Railroad Company except the shares enumerated in said Schedule "F" attached to complaint herein. I deny that there was any

such attempt made by me or any one in the year 1869 as is alleged in sub. XVI of complaint—to & nominally cancel any stock in said Oregon Central Railroad Company I admit that in March, 1870(the capital stock of the Oregon Central Railroad Company was cancelled by the stockholders and Directors of that Company to wit: on the 28 & 29 days of March, 1870, at the date of the dissolution of such company as will more fully appear from other portions of this affidavit, but I deny that that there was any confederation or colusion in that transaction by myself or any one. I deny that I did ever with intent to cheat or defraud plaintiff Elliott assume pretend, or attempt to surrender or cancel any shares of stock in said Oregon Central Railroad Company. I deny that I have ever assumed to control, possess or manage the roadbed railway depots franchises or subsidies referred to in complaint for my own benefit or to the exclusion of any real bona fide stockholder of the said Oregon Central Railroad Company. I deny that the proceedings of said stockholders meeting held March 28, 1870 or at any other time, or of said directors in causing the execution of said Indenture referred to in subdivision 17th of complaint were dictated or controlled by me, or that each and every, or any of the stockholders present at said stockholders meeting voted in favor of said sale or transfer at the request of or at the dictation of myself, or as my tools or confederates. I admit that it was the common judgment of all said stockholders and directors and myself that such proceeding then had was for the best interests of all con-

cerned in said Oregon Central Railroad Co. I deny that the property, rights and franchises and subsidies which were transferred, or which purports to be transferred by said Indenture mentioned in subdivision 17 of complaint herein were on the 28th day of March 1870, or at any other time of the value of seven millions of dollars or of any greater value than from \$800,000 to \$1,000,000. I deny that they are now of that value, and I aver that the addition to their value has been solely by reason of money since then expended upon it by the Oregon and Cal. Railroad Co. I deny that the said Oregon and California Railroad Company has not paid any money or other valuable thing for said sale and transfer, but I aver and state the fact to be, that said Oregon and California Railroad Company has paid all debts and liabilities of said Oregon Central Railroad Company, and caused all its obligations to be surrendered and cancelled, to wit, an indebtedness of over \$800,000. I deny that by any machinations or contrivances of mine or the directors of the Oregon Central Railroad Company, said last mentioned corporation ceased to exist. I deny any improper intent or design on my part or that of my associates in affecting the dissolution of the Oregon Central Railroad Company or in organizing the Oregon and California Railroad Company. I deny that the property included in said mortgage and deed of trust referred to in exhibit attached to complaint is in excess to the extent in value of Five Millions of dollars, or any sum of any amount necessary to secure the payment of the principal sums and interest to accrue on said

bonds so issued by said Oregon and California Railroad Company. I further depose and say that the 3700 shares of stock of the Oregon Central Railroad Company which the plaintiff John Nightingale claims to own and of which it is averred in the complaint therein he is the bona fide owner and holder, are all each and every share thereof a part of the two millions of dollars of the preferred stock referred to in the contract of April 23, 1867, between A. J. Cook (so called) and the Oregon Central Railroad Company a copy of which contract is set out on pages 285-288 and 287 of Exhibit attached to complainant entitled Elliott vs. Holladay et al &c &c and to which pages I refer as a part of this my affidavit, and I further state that all such stock is denominated "Preferred seven per cent non-assessable Gold interest-bearing stock" and all such stock was so intended to be such preferred seven per cent non assessable gold interest bearing stock by said Oregon Central Railroad Company its directors and officers, and was intended to be and was different from the Volume of the stock issued by such corporation, that no consideration was ever paid for any of said preferred stock nor was it intended that there should be a copy of the certificates of said preferred stock is hereto attached marked Exhibit "A" and made a part of this affidavit, and a copy of the certificate of the common stock in said Oregon Central Railroad Company, as issued by such corporation is also hereto attached marked Exhibit "B" and made a part hereof. I further state that I am advised

by my counsel and I verily believe that said Oregon Central Railroad Company had no power to issue any such stock as that designated Preferred seven per cent non-assessable gold interest bearing stock, and that the same and each share thereof is ultra vires and void. I further state that the 3700 shares of such preferred interest bearing non-assessable stock of which the plaintiff John Nightingale now claims to be the bona fide owner and holder were on the day of the date of said contract of April 23rd, 1867, between said Oregon Central Railroad Company and A. J. Cook and which contract so far as it calls for the issuing of such preferred interest bearing stock was and is one which said corporation had no power to make as I am advised by my counsel and verily believe but as I am advised and believe was illegally issued issued and without authority or consideration by said Oregon Central Railroad Company in the name of A. J. Cook in whose name said contract was made I further state upon information and belief that the said certificates of stock representing said 3700 shares were delivered to the plaintiff Simon G. Elliott, who afterwards delivered them without any consideration being paid therefor, except a nominal one to the persons whose names appear in Schedule "F" attached to complaint herein. I further state that said plaintiff Nightingale with full knowledge as I believe of the facts that such stock was issued illegally and without any consideration to said Elliott in the name of said A. J. Cook and by said Elliott delivered to said

persons named in said Schedule "F" without any consideration except a nominal one confederated with said persons named in Schedule "F" and for the purpose of harrassing and annoying said Oregon and California Railroad Company and this affiant as a principal stockholder therein with divers vexation suits, obtained possession of said certificates of preferred stock, to wit: said 3700 shares. That as I believe said John Nightingale paid no consideration whatever for said 3700 shares of stock and has not received the same by any legal transfer or assignment from said A. J. Cook in whose name they were issued, and that he, said Nightingale brings this suit for the benefit not of himself alone but for the use and benefit of said persons named in Schedule "F" of Exhibit attached to complaint herein. That said 3700 shares of stock now claimed by said Nightingale has never been transferred on the books of the said Oregon Central Railroad Company but were on the 28th day of March 1870 yet standing on said books in the name of A. J. Cook at which time said Oregon Central Railroad Company was legally dissolved by a vote of two thirds of all its stock at a meeting duly and legally called for such purpose at the office of the Company in Salem, Oregon, the object of such meeting having been stated in the notice calling the meeting which notice was duly and legally given as required by law and the by-laws of the said company, and at which time and place the contracts between the Oregon Central Railroad Company and A. J. Cook

and A. J. Cook & Co. were legally cancelled by said company and the assignees of said contracts. And that a copy of the resolution passed by the directors of the Oregon Central Railroad Company calling such meeting of the stockholders of said Company to meet on said 28th day of March 1870 for the purpose of determining the propriety of and authorizing the dissolution of such corporation, the settling of its business, disposing of its property and the division of its capital stock, and also a copy of the notice for such meeting which notice was published by the said corporation as in and by said resolution provided will be found at large on page 305 of said Exhibit attached to complaint herein. That at such meeting of the stock holders, and in pursuance of such notice, the sale of all its property was made for the purpose and in the manner and for the reasons as will more fully appear by the recitals in said deed of Conveyance a copy of which is given upon pages 298 to 311, inclusive in said exhibit attached to complaint herein and said Oregon Central Railroad Company was then duly and legally dissolved and all its stock legally cancelled in strict compliance with the provisions of the statutes of Oregon in such cases made and provided as I am by my counsel advised and as I verily believe, all of which proceedings were were ratified and confirmed by the directors of the said Oregon Central Railroad Company at a meeting duly called and legally held at the office of the company on the same day the statutes to which I refer and under

which said proceedings were had is an Act entitled "An Act to amend an Act relating to private corporations their formation and the appropriation of land for corporate purposes, passed by the Legislature of the State of Oregon, and approved Oct. 24, 1866, and which act reads as follows:

Sec. 1. Be it enacted by the Legislative assembly of the State of Oregon, That Section nineteen, Title I of Chapter eight of said Act be amended to read as follows:

"Sec. 19. Any corporation organized under the provisions of this act may at any meeting of the stockholders which is called for such purpose by a vote of the majority of the stock of such corporation increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business, and disposing of its property, and dividing its capital stock in any manner it may see proper."

I further state that on the 12th day of Sept. 1868, a co-partnership was formed between C. Temple Emmet, Simon G. Elliott and this affiant, a copy of the articles whereby such co-partnership was formed appears on page 331-332 of Exhibit attached to complaint herein to which I refer and make the same a part of this affidavit. That at the date of such co-partnership the plaintiff Simon G. Elliott did not have own or control & in his own right or name or in the right or name of A. J. Cook or A. J. Cook & Co. or of any one any of the stock of the Oregon Central Rail-

road Company, except a portion of the one million dollars of preferred stock issued as herein & before stated in the name of A. J. Cook and then in the hands of plaintiff Elliott he did not then, nor has he ever at any time since as I am informed and believe had any of what is known as the common stock of said Oregon Central Railroad Company in his name or in his possession or under his control, except as one of the members of the firm of Ben Holladay & Co. That all the stock that said Elliott did have in his possession or under his control in said Oregon Central Railroad Company on the 12th day of Sept. 1868 was then transferred to the firm of Ben Holladay and Company by him, and since that date as I am informed and believe said plaintiff Elliott has not received from any person or persons, firm or corporation any stock in the said Oregon Central Railroad Company, and he never has been at any time the owner or holder of any share or shares of such stock on the books of said company in his own name either preferred or common nor has he ever as I am informed and believe made any demand to have any stock in such corporation whatever transferred to him on such books and if the said Simon G. Elliott has at this time in his possession any certificate or certificates of stock in said Oregon Central Railroad Company for any share or number of shares it is a part of said preferred seven per cent non-assessable interest bearing stock specified as being held by said persons in Schedule "F" of complaint and the whole thereof is as I am advised

and believe illegal and void, and the whole thereof was on said 28th & 29 days of March 1870 legally cancelled by the stockholders and directors of said defendant The Oregon Central Railroad Company is and by virtue of the proceedings then had and recitals from the record of which will more fully appear in the copy of deed of transfer from the Oregon Central Railroad Company defendant, to the Oregon and California Railroad Company Deft. in the Exhibit attached to plaintiff's complaint herein, and which copy of deed is referred to by me and made a part of this my affidavit. I also refer to the following acts of the Legislature of the State of Oregon under which the defendants the Oregon Central Railroad Company and the Oregon and California Railroad Company were incorporated and by and under which the defendant the Oregon Central Railroad Company was dissolved and disposition of its property made and make them a part of this my affidavit, to wit: "An Act providing for private incorporations and the appropriations of private property therefor, approved Oct. 14th, 1862 and subsequent amendments thereto. I further state and so the fact is that one of the principle considerations moving to the formation of said Articles of Co-partnership between the plaintiff S. G. Elliott, C. Temple Emmet and this affiant, and one upon which this affiant and C. Temple Emmet acted and relied was the representations made by the plaintiff Elliott prior to and at the time of entering into such articles of co-partnership—that he—Elliott was

a civil engineer and a competent railroad builder and qualified to perform the duties of superintendent of construction of said Oregon Central Railroad also that A. J. Cook and A. J. Cook & Co. owned and controlled and would deliver to the firm of Ben Holladay & Co. all the bonds of the Oregon Central Railroad Company issued prior to that date to wit, amounting in nominal value to \$775,000 except the amount of \$40,000 before that date alleged to have been sold for machinery and that he Elliott had full power to sell convey and deliver the same to Ben Holladay and Co. Also that the roadbed from Portland to Salem could be completed ready for the rails for the sum of \$40,000 and that he Elliott deft. herein as superintendent of construction could so complete it ready for the rails for that sum and also that he had machinery enough on hand with which the first 50 miles of the road could be completed, all of which representations were false and fraudulent and made with a view on the part of plff. Elliott to induce this affiant and said Emmet to enter into said contract of co-partnership, that the said representations were false in this, that said plaintiff is not now nor was not then a civil engineer or a competent railroad builder, and was then wholly incompetent for the said position of superintendent of construction of said railroad or any railroad and he well knew the fact at the time he made such representations that it was not true that said A. J. Cook or A. J. Cook & Co. at the time of making such representations or at the time of the

formation of such articles of co-partnership were the owners of, or controlled all said \$775,000 bonds nominal value or otherwise of said Company except such \$40,000 sold for machinery, that it was not true that the plff. Elliott did then have the right or power to sell or deliver the whole thereof except said \$40,000 but a large amount in addition to said \$40,000 to wit—over \$22,000 of such bonds were at the time of making such contract of co-partnership in the hands and under the control of other parties, and said A. J. Cook or A. J. Cook & Co. or said Elliott never did deliver the same to the firm of Ben Holladay & Co. but the same were purchased in by this affiant and C. Temple Enimet. That it was not true that the grading on said road had progressed so far as represented by said Elliott. That it was not true that the road eo Salem could be made ready for the rails for an additional expenditure of \$40,000, but I aver the fact to be that it required an expenditure (and that too principally under the direction of plff Elliott as superintendent of construction) of over \$100,000.00|100 to prepare the first 20 miles ready for the ties, and also an expenditure of near \$100,000.00|100 to prepare the balance of the said road to Salem ready for the rails. That it was not true that the amount of machinery was on hand as represented to be by said Elliott. I further state that at the time of the formation of said articles of co-partnership of Sept. 12, 1868 all the bonds stocks and assets of every value which the said A. J. Cook, A. J. Cook & Co. and Simon G. Elliott did

have own or possess, or which they had received or were entitled at any time to receive under and by virtue of all the contracts between A. J. Cook and A. J. Cook & Co. and the Oregon Central Railroad Company original and supplemental including all such contracts which were by said A. J. Cook and A. J. Cook & Co. and by plff Simon G. Elliott transferred by written assignment to the firm of Ben Holladay and Company, a copy of which written assignment is hereto attached marked Exhibit "O" and made part hereof, which assignment included all the stocks of said Oregon Central Railroad Company ever owned or claimed to be owned by plff Elliott and the 16,000 shares of stock which the plff Elliott now claims in his complaint herein to be the bona fide holder and owner of, is in part the same stock so transferred to the firm of Ben Holladay & Company by said plff Elliott and in part stock that was subsequently transferred to Ben Holladay & Co. by the Oregon Central Railroad Company. I further state that about the first of July 1869, work was resumed by the firm of Ben Holladay & Co. on said Oregon Central Railroad with a view to complete on or before Dec. 24th, 1869, the first 20 miles of said railroad as in and by the said Act of Congress in complaint referred to required (the work during the winter of 1868-9 having been subsequently suspended) the plaintiff Elliott took charge in July 1869, on his return from the east and resumed his position as superintendent of construction of the said 20 miles. That he had full control of

the work as superintendent of construction with full instructions from myself to place all the men on the work necessary to complete the 20 miles within the time, and to complete it, all the money necessary or required was furnished and on hand. I further state that the plff Elliott during the months of August and September wholly failed to perform the duties of Superintendent of Construction in a faithful, competent and proper manner. That he proved himself wholly incompetent for such position of Superintendent of Construction, he failed to put men enough on the work although told repeatedly that he could not with the force on hand complete the 20 miles within the time required by the said Act of Congress, he failed to do the work or have it done in a workmanlike manner, and that he did studiously manage and conduct the work on such twenty miles in such a manner so as to prevent if possible the completion of the said twenty miles within the time prescribed by the Acts of Congress, his object in so doing was to disable this affiant and said Emmet and the firm of Ben Holladay & Company from carrying out their said contracts, and in order that the contracts for the construction of said railroad might pass into other hands and with a view upon the part of said Elliott of obtaining a larger interest in said contracts than he had in the firm of Ben Holladay & Co. That by reason of all said improper conduct and incompetency of said Elliott as one of the partners of the firm of Ben Holladay & Co. this affiant and said Emmet were injured

and damaged in the sum of over one hundred thousand dollars, at and during the months of August, Sept. and to Oct. 4th 1869, the interests of C. Temple Emmet in the said firm of Ben Holladay & Co. were managed and controlled by this affiant and as his representative and agent, and on the 4th Cct. 1869 this affiant being informed of the incompetency of said Elliott and being satisfied also as I still am that he did not intend to complete said twenty miles within the time by Dec. 24, -869, said Elliott was on said 4th Oct. 1869, discharged by this affiant (acting for myself and said Emmet) from such position of general superintendent of construction and on or about Nov. 4, 1869 this affiant and said Emmet commenced a suit against said Elliott plff herein in the Circuit Court of the State of Oregon for the County of Multnomah for the purpose of obtaining a decree of court dissolving such co-partnership and settling up the business of such firm, a copy of the complaint in which suit appears on pages 332 to 338 inclusive of exhibit attached to complaint. That said S. G. Elliott plff herein appeared in said suit and filed an answer a general denial and issue was on the day of July 1870 referred by said court to J. C. Moreland as referee and the said cause is now on trial before said referee.

I further state the fact to be that although said articles of co-partnership of Ben Holladay & Co. of date Sept. 12, 1868, stipulate that the plff S. G. Elliott was to have a 6/40 interest therein, he, said Elliott really

had but 4|40 or 1|10 interest therein, the said S. G. Elliott held the other 2|40 interest in trust for other parties 1|40 in trust for Gardner Elliott and 1|40 in trust for T. R. Brooks, and said Gardner Elliott and T. R. Brooks have long since transferred, sold and conveyed all their interest in such firm—to me—the said S. G. Elliott plff herein, having also conveyed to me said 2|40 interest so held in trust as aforesaid so that on the 4th day of Oct. 1869, the interest of plff. Elliott in the firm of Ben Holladay & Co. was 1|10, and I further state that after said plff. was discharged as superintendent and said suit was commenced I proceeded in conjunction with Mr. Emmet to complete the first 20 miles of the road and did on Dec. 24, 1869, by making great exertions. To that date we found it impossible to make any sale or negotiations of the bonds of the Oregon Central Railroad Company, owing to the attacks constantly being made on our company by a rival company in Oregon of the same name claiming our corporate name and franchise which attacks were made in divers ways in the courts and by circulars. The bonds and stocks of our company were worthless in the markets we did borrow money in San Francisco to be used in carrying on the work, for which a part of these bonds were put up as collateral, as stated in my deposition attached to the complaint herein but I aver that said money or no part of it was obtained on the credit of said bonds, but upon the individaul responsibility of Mr. Emmet and myself, then composing the firm of Ben Holla-

day & Co., and the placing of these bonds as collateral was more a matter of form than of any real value attached to the bonds or credit given on account of them. I further state that it would have been ruinous to the firm of Ben Holladay & Co. had they been compelled to proceed with the construction of the said Railroad under said contracts for the reason, that the bonds of said company could not be sold. I further state that it was for these reasons that the contracts of A. J. Cook and A. J. Cook & Co. with the Oregon Central Railroad Company were cancelled and the said Oregon Central Railroad Company was dissolved, the interest on said bonds were coming due and the Oregon Central Railroad Company had no means to meet its payment. It was therefore mutually agreed that it would be for the best interest not only of the stockholders of said company, but of all concerned the contractors as well—to cancel said contracts, thereby relieving both the company and the contractors from an embarrassing position. In 1870 March 17th, the Oregon and California Railroad Company was organized for the purpose set forth in its articles of Incorporation, and by agreement an assignment of the property of the Oregon Central Railroad was taken in consideration of the payment and cancellation of all the indebtedness of the Oregon Central Railroad Company at that time to-wit, over \$800,000. That since that time the Oregon and California Railroad Company has received on the sale of its bonds \$5,050,000 that being the whole amount sold

to this date, the net sum of.....\$2,834,071.73

That since the organization of the Oregon and California Railroad Company such Company has expended its construction and equipment of its road so far as built the sum of\$3,295,759.14

That parties in Germany have the option during the present year of taking \$3,650,000 at 60 cents on the dollar and during the year 1872, the option of taking \$3,800,000 at same rate. Those sold were sold for 60 cents on the dollar—gross—all commissions on exchanges falling on the company. The last option has to be declared on Jany. 1st, 1872. I will further state that I have never used any of the bonds or moneys arising from the sale of the bonds of the Oregon and California Railroad Company for my own private purposes, some of the bonds of the Oregon and Cal. Railroad Company were used by my agent Mr. Wm. Norris in San Francisco at one time as collateral security but the same was done in my absence and without my knowledge. Said Norris did in 1870 and in Jany. 1871 as I learned for the first time in May 1871 use 900 of the bonds of the Oregon and Cal. Railroad Company of the denomination of \$1000 each as collateral security to secure the payment of money borrowed by said Norris as my agent for my personal use, but I state that all the money to secure the payment of which these bonds were as collateral security has been paid and the bonds by him then used as collateral security have been forwarded to London to

await the option of the Salsbach contract for the purchase of the bonds of the company. I further state here in explanation of the statement that I am the owner and holder of 134,996 shares of the capital stock of the Oregon and California Railroad Company. That I am legally and nominally such owner but all such stock so held by me is in fact owned by the North Pacific Transportation Company, a corporation organized under the laws of California and having its principle office and place of business in San Francisco, Cal. That I individually and personally own in my own right the 28|33 of all the capital stock in said North Pacific Transportation Company so that I am in fact the owner of but 28|33 of all the stock so held by me in the Oregon and California Railroad Company. I further state the fact to be fact to be—that the plaintiff Simon G. Elliott was present at the meeting of the Board of Directors on Sep. 7, 1869, and had full knowledge of the proceedings then had, by which said 39,930 shares of the stock of the said Oregon Central Railroad Company was issued to this affiant and he said Elliot plff herein consented to such proceedings and aided in them. I further state that it was the intention at the time both of the directors of said company and of the firm of Ben Holladay & Co., that said 39,930 shares of stock should be issued to Ben Holladay & Co. but through some inadvertence or mistake of the secretary or other parties said stock was directed to be issued and was actually issued to myself. Upon the discovery of which after-

wards I immediately transferred the same to Ben Holladay & Co. upon the books of the company. I further state the said Simon G. Elliott had notice and knowledge prior to March 17th, 1870, of the intention to organize the Oregon and California Railroad Company. That he knew soon after it was organized that the same was organized and about to issue bonds, that he knew in June, 1870 while here in Portland for some two or three weeks—of the transfer from the Oregon Central to the Oregon and California Railroad Co., and of the issue of bonds by the last named company, and of the execution of the said mortgage and deed of Trust, and of the continuation of the work on the road by the Oregon and California Railroad Company, yet said Elliott has ever since and until this application stood by and failed to make any application to any court for an injunction to stay any of such proceedings, but he plff Elliott has for the purpose as I believe of vexation and for the purpose of harrassing this affiant commenced a series of actions and suits against this affiant and against the defts' herein some of which are still pending. In June 1870, he commenced a suit in the Circuit Court of the State of Oregon for Multnomah County, a certified copy of the complaint in which suit is hereto attached marked Exhibit "M" and made a part hereof, which suit is still pending in said Circuit Court, but which suit the said plaintiff Simon G. Elliott has never since the filing of the complaint therein in July 1870 in any manner prosecuted or attempted to prosecute,

nor has he at any time move the said court or judge thereof for any injunction or other restraining order. That said plff Elliott did also about the month of Oct. or Nov. 1869 commenced an action in said Circuit Court of the State of Oregon for the Coupty of Multnomah against this affiant and C. Temple Emmet in which he claimed to recover about \$21,000 alleged to be due him growing out of said co-partnership agreement of Sep. 12, 1868, which action after the same had been some time pending said plff Elliott caused to be dismissed. He then commenced a similar action in this honorable court against this affiant and C. Temple Emmet, as will more fully appear from the records of this court which action was dismissed by a judgment in favor of the deft. on a plea in abatement to the jurisdiction of the court. That about the same time or soon thereafter said plaintiff Elliott commenced an action against this affiant and said C. Temple Emmett in one of the courts in New York City for the same cause as that involved in the two actions last referred to, which action is still pending. That in December last said plff S. G. Elliott commenced a suit in the 15th District Court of the State of California for the City and County of San Francisco against the defendants in this suit also making defendants therein C. Temple Emmet, Milton S. Latham, Faxon D. Atherton, T. R. Brooks, James P. Flint, Wm. Norris and this affiant a copy of the complaint in which case is hereto attached marked "Exhibit "S" and made a part hereof, which suit is still

pending and said Elliott is still prosecuting the same. I further state a Patent has been issued for a portion of the bonds included in said Congressional grant, which Patent I bring into court, mark it Exhibit "T" and make it a part of this my affidavit. I further state that from within a week or two after Oct. 4, 1869, said plff Elliott has been fortunate enough, through what means I know not of securing the assistance of able attorneys in his behalf in the suit now pending in the Circuit Court of this state and now on trial before the Referee Judge Shattuck, B. Killin and Wm. F. Trimble have appeared as his attorneys of record—since about the time of the commencement of the action in New York he has had able counsel. The case in San Francisco now pending there he had as his attorneys of record John B. Felton and Wm. H. Patterson, and he Elliott ever since Oct. 1869, has had as is his attorneys said Shattuck, Killin & Trimble and ever since Dec. last he has had as his counsel and attorneys said Patterson & Felton. I further state that all the money that has been expended in the construction and equipment of the Oregon and California Railroad has been moneys received from the sales of the bonds of the Oregon and California Railroad Company and moneys furnished by the North Pacific Transportation Company and C. T. Emmet. I further state that on the 28th day of March 1871 a contract was entered into in writing between the Trustees in said deed of trust set out in Exhibit attached to complaint herein and deft. Oregon and Cal-

ifornia Railroad Company and the European and Oregon Land Company, a copy of which contract is hereto attached marked "Exhibit "W" and made a part of this affidavit. I further state in answer to sub. 12 of complaint filed herein that it is not true that on the 7th day of September 1869, or at any other time, E. M. Cook, Geo. L. Woods, I. H. Moores, John F. Miller, Jacob Conser, J. H. Douthitt, A. L. Lovejoy, I. R. Moores, J. H. Foster, J. C. Hawthorne, Geo. W. Weidler, A. Bush, or any of them only nominally owned one share of the capital stock of said Oregon Central Railroad Company. Deny that they had no interest in such stock or that they or any of them held the same for my benefit or simply to enable them to act as directors, but I aver the fact to be that each of said persons last named were on the 7th day of Sep. 1869 and until the dissolution of said company March 28, 1870, stockholders of said Oregon Central Railroad Company, in good faith holding stock in said company in their own names respectively bona fide and in their own right respectively that on said Sept. 7th, 1869, and at the time of said transfer of 39,930 shares of stock referred to in sub. 12 of complaint a number of said persons had more than one share of such capital stock and at the time of the passage of the resolution a copy of which appears on page 292 of said deposition attached to complaint herein said persons held in their own right and bona fide the following shares of stock in such Oregon Central Railroad Company, to wit:

E. N. Cook	248 shares
Geo. L. Woods	168 shares
I. R. Moores	118 shares
John F. Miller	1 share
Jacob Conser	588 shares
J. H. Douthett	588 shares
A. L. Lovejoy	588 shares
J. H. Moores	268 shares
J. H. Foster	1 share
J. C. Hawthorne	1 share
Geo. W. Weidler	1 share
A. Bush	1 share

And I deny that said 39,930 shares of stock or any part thereof were issued without any consideration moving from me. I deny that the same were issued to me with any intent or design of enabling me to carry out any scheme or contrivance for my own benefit, or as alleged in Complaint, but I aver the sole object of purchasing said stock was in hopes of giving thereby credit and salability to the bonds of such company. I deny in answer to sub. 13 of complaint that I had on and prior to Sep. 1869, by any devices or contrivances become possessed of or that there was then standing in my name or in the name of any confederate of mine all the shares of the capital stock of said company issued or provided to be issued except the number of shares particularly enumerated in schedule "F" of complaint. I deny that said persons named in said schedule "F" of complaint were then or ever the owners by virtue of any legal assignment or

transfer or of the number of shares specified in said schedule or of any number of shares whatever of said capital stock of said Oregon Central Railroad Company. I further state that it is not true that either of the plaintiffs has before the commencement of this suit made any request in writing or otherwise of the Oregon Central Railroad Company or its board of directors or any of them or its board of directors as the same existed at the date of said Indenture of Conveyance from the Oregon Central to the Oregon and California Railroad Company or of any of them to institute this action or any similar action or suit or any action suit, or proceeding in the name of the said Oregon Central Railroad Company as plaintiff against the Oregon and California Railroad Company or any other person to obtain in substance or otherwise the relief or judgment prayed for in plffs. complaint. I deny that the said Oregon Central Railroad Company or its directors or officers or any of them are or have been acting under the advice or instigation of myself or C. Temple Emmet, or by reason of any such advice or instigation the defendant the O. C. or any of their confederates have refused to institute or prosecute any such suit for the relief prayed for herein or any relief. I deny that said directors or officers of said Oregon Central Railroad Company are under the influence or control of myself or C. Temple Emmet. I deny that said directors or officers would connive with me or me with them, or so manage as to permit judgment or decree to be entered in

favor of O. C. or any party not justly entitled to judgment and decree in the event that said O. C. should bring such suit. I deny that the Plffs. or either of them did on the 20th day of May or ever apply or cause applications to be made to either of defendants or their agents by letter or otherwise requesting them or either or any of them to act towards Plffs. honorably or justly or as in complaint prayed for or in any manner whatever. I further state that in December 1870 the plaintiff John Nightingale commenced a suit in the 15 district court of the State California in and for the City and County of San Francisco which suit is brought on the same 3700 shares of stock, and the subject matter of said suit and the relief prayed for are the same as the subject matter and relief prayed for in this suit. The defendants in said suit are Ben Holladay & Co., C. Temple Emmet, Wm. Norris, Milton S. Latham, Faxon D. Atherton, The Oregon Central Railroad Company and the Oregon and California Railroad Company. A copy of the complaint in said suit is hereto attached marked Exhibit "Z" and made a part thereof, which suit in said 15 District Court of California is still pending in said court, and depositions have been taken therein it being the same suit referred to in Exhibit attached to complaint herein. I further state that at no time since Ben Holladay and Company first had any connection with the Oregon Central Railroad Co. could the bonds of that corporation be sold or negotiated nor could any money have been borrowed on their credit, or secur-

ity, solely and without personal responsibility or other security.

I further state that neither the plaintiff John Nightingale nor any of the persons named in schedule "F" of Complaint nor any of the persons from whom said Nightingale claims to have obtained said 3700 shares of stock has ever at any time made any appeal to the Oregon Central Railroad Company or its secretary or President or any of its Officers to have any shares of stock transferred to him or them or any of them on the books of said Oregon Central Railroad Company. I further state that all the 3700 shares of stock claimed by plff. John Nightingale in his complaint were in form but illegally issued to A. J. Cook on the books of the said Oregon Central Railroad Company, on or about April 23, 1867, and said A. J. Cook has never at any time transferred or assigned any of said 3700 shares of stock to plaintiff Nightingale or to any other person or persons; nor has said A. J. Cook ever at any time authorized or empowered any person or persons in writing or otherwise to transfer sell or assign any of said 3700 shares of stock to plaintiff Nightingale or to any other person or persons. I further state the fact to be and so it is. That said 3700 shares of the capital stock so claimed by plaintiff Nightingale was never subscribed for by said A. J. Cook or by any person or persons for him, but the same was issued by said Oregon Central Railroad Company in pursuance of a resolution of the Board of Directors of said Oregon Central Railroad Company

adopted April 23, 1867, of which the following is a copy.

“Resolved. That the President and Secretary are
“hereby instructed to execute two millions of non-as-
“sessable preferred stock of the Oregon Central Rail-
“road Company in favor of Albert J. Cook the said
“proposed contractor to be delivered to him on the
“final execution and acceptance of the contract au-
“thorized to be made as part payment for the con-
“struction of the road and as collateral security for
“moneys to be advanced by said contractors as a
“working capital. Said stock to bear interest at the
“rate of seven per cent per annum payable in gold
“and there is hereby set apart a sufficient amount out
“of the first net earnings of the road to pay the same.”

And it is further resolved that the following form of stock be approved by the Board (to wit—the form as appears by Exhibit..... attached to this affidavit.)

I further state and so the fact is that said plaintiff Simon G. Elliott at the time of and prior to the execution of said contract of April 23, 1867 (a copy of which appears in full in the printed copy of the deposition of plaintiff Elliott taken during the latter part of the month of June 1871 before J. C. Moreland the Referee in said case hereinbefore referred to now pending and on trial before said referee and which copy of said deposition hereto attached marked “S” and made a part of this affidavit, and all of which deposition I desire to use on the hearing of the motion in this case) pretended to be the attorney in fact of one A. J. Cook

and he, Elliott, then represented falsely and fraudulently to the officers and directors of said Oregon Central Railroad Company, that said A. J. Cook was a wealthy Railroad contractor of the State of Massachusetts all of which representations as to his being such resident of Massachusetts, or such railroad contractor, or such wealthy man were absolutely false and fraudulent and so known to be at the time by said Simon G. Elliott, and made with the intent to procure the execution of said contract and the issue of said stock. The fact being as I verily believe that there was no such person in existence as said A. J. Cook, or if any person of such name ever did exist he was an irresponsible person without either wealth, credit, reputation or any other qualification whatever for the position of a railroad contractor, and such name was used fraudulently by said Elliott for the sole purpose of obtaining such contracts and stock to himself. And said contract was made in pursuance of the following resolution of the Board of Directors of said Oregon Central Railroad Company.

“Resolved. That the President and Secretry are
“instructed on the part of the Oregon Central Rail-
“road Company to execute a contract with Albert J.
“Cook of the State of Massachusetts for the building,
“completing and equipping of a railroad according to
“propositions now submitted and before the Board
“from Portland, Oregon, southerly through the Wil-
“lamette Valley one hundred and fifty miles in divis-
“ions as specified and report the same back for ap-

“proval when executed.”

I further deny, in answer to sub 33 of complaint filed herein that the defendant the Oregon Central Railroad Company through its President and other officers or otherwise threaten to, or is about, or intends to make any other disposition of the lands granted by said acts of Congress except as has been done before the commencement of this suit, as will appear by the said contract a copy of which is attached to my affidavit herein as aforesaid, and I deny that the said Oregon and California Railroad Company is threatening, or about, or intends to make any sale or other disposition of the Oregon and California Railroad or any of its property.

BEN HOLLADAY,

Subscribed and sworn to before this 22d day of June, 1871.

[Seal.]

RALPH WILCOX,

Clerk.

AFFIDAVIT OF BEN HOLLADAY.
WITH EXHIBITS ATTACHED AND MADE
PART THEREOF.

Filed June 22, 1871 at
30 minutes past 11 o'clock A. M. Ralph Wilcox, Clerk.
UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Affidavit of Ben Holladay

(omitting the exhibits attached thereto) in cause No. 134, John Nightingale and Simon G. Elliott, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this October 7, A. D., 1911.

[Seal.]

G. H. MARSH,
Clerk.

[Complainant's Exhibit 53.]

*In the Circuit Court of the United States
for the District of Oregon*

John Nightingale & Simon G. Elliott

Complainants,

vs.

The Oregon Central Railroad Company and the Oregon and California Railroad Co.

Defendants.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

(Exhibit No. 21.)

To save the expense of proving the originals of the Exhibits hereinafter mentioned and hereto attached the parties having had an opportunity to compare such ex-

hibits with the originals and now being satisfied that the same are true copies of the originals of which they purport to be copies it is hereby stipulated and agreed between the complainants in the above entitled suit by W. H. Effinger their attorney & solicitor and the defendants by Dolph Bronough Dolph & Simon their attorneys and solicitors.

First. That Exhibit No. 1 hereto attached is a true and correct copy of the original Articles of Incorporation of the Oregon Central Railroad Company of Portland, Oregon filed in the office of the Secretary of State of the State of Oregon the 21st day of November, 1866, and that the same may be read in evidence in this suit at the trial thereof and upon appeal and upon any hearing therein subject only to such objections for immateriality as might be made to the original Articles or duly certified copy thereof if offered in evidence.

Second. That Exhibit No. 2, hereto attached is a true and correct copy of the original Articles of Incorporation of the Oregon Central Railroad Company of Salem, and that the same may be read in evidence in this suit upon the trial thereof and upon appeal and upon any hearing thereof subject only to such objections for immateriality as might be taken to the original Articles of Incorporation or a duly certified copy thereof if offered in evidence.

3rd. That Exhibit No. 3, hereto attached is a true and correct copy of House Joint Resolution No. 1 duly adopted by the Senate and the House of Representatives of the Legislative Assembly of the State of Oregon Oct.

10th 1866 and that the same may be read in evidence upon the trial of this suit and in any hearing thereon subject only to such objections as might be made to the original Resolution or a duly certified and proved copy thereof if offered in evidence.

4th. That Exhibit No. 4, hereto attached is a true and correct copy of the original Articles of Incorporation of the Oregon and California Railroad Company in the pleadings mentioned and that the same may be read in evidence upon the trial of this suit and upon appeal and upon any hearing therein subject only to such objections for immateriality as might be taken to the original Articles of Incorporation if duly proved and offered in evidence or to a duly certified copy thereof.

5th. That Exhibit No. 5, hereto attached, which is also the same as Exhibit "B" of the Answer is a true and correct copy or blank certificate of the same form used in the alleged issue of Non Assessable Preferred Gold Interest Bearing Stock mentioned in the pleadings in this suit and that the same may be read in evidence upon the trial of this suit and on appeal on any hearing therein so far as the same may be material to any issue in this suit.

6th. That Exhibit No. 6, hereto attached, which is also the same as Exhibit "D" of the Answer herein is a true and correct copy of the Supplemental Agreement of November 27th, 1867, purporting to have been made between Gov. Geo. L. Woods, President, O. C. R. R. Co. and Albert J. Cook by S. G. Elliott referred to in the Answer and that the same may be read in evidence

in this suit upon the trial thereof and upon appeal and upon any hearing therein subject to such objections as might be taken to the original thereof after proof of the signatures to the same.

7th. That Exhibit No. 7, hereto attached, which is also the same as Exhibit "E" of the Answer filed herein is a true and correct copy of the original Articles of Copartnership between Ben Holladay C. Temple Emmett & S. G. Elliott mentioned in the pleadings in this suit and that the same may be read in evidence upon the trial of this suit and upon appeal and upon any hearing therein subject only to such objections for immateriality as might be made to the Original Articles if duly proved and offered in evidence.

8th. That Exhibit No. 8, hereto attached is a true and correct copy of that portion of the original Stock Book of the said Oregon Central Railroad Company of Salem, Oregon, showing all the subscriptions to the capital stock of said company the manner in which such subscriptions were made and the times when made and that such copy may be offered and received and read in evidence in this suit in the same manner & with like effect that the original stock book might be if duly proved and offered and subject only to such objections as might be made to such original if so offered.

8th. That Exhibits No. 9, 10, 11, 12, 13, 14, 15, 16, 17 & 18, hereto attached, which are the same as Exhibits F, G, H, K, L, M, N, O, P & R of the answer herein are true and correct copies of what they respectively purport to be, to-wit:

Exhibit No. 9, Partial minutes of the proceedings of the meeting of the Board of Directors of the Oregon Central Railroad Company of Salem of March 28th, 1870, and of the communication of Ben Holladay & Co., and of Resolutions of the Board of Directors, passed at said meeting.

Exhibit No. 10. Conveyance of Ben Holladay & Co. to the Oregon Central Railroad Co. of Salem.

Exhibit No. 11. Of an agreement between the Oregon Central Railroad Co. of Salem and Ben Holladay & Co.

Exhibit No. 12. Of the minutes of the proceedings of a Directors meeting of said Oregon Central Railroad Company of Salem held March 14th 1870 at Seven o'clock P. M.

Exhibit No. 13. Of a notice given & published to stockholders of the Oregon Central Railroad Co. of Salem of a meeting of stockholders of said company to be held March 28th, 1870 at 7 o'clock P. M.

Exhibit No. 14. Of the minutes of the proceedings of a meeting of the Board of Directors of the Oregon Central Railroad Company of Salem Oregon held March 28 A. D. 1870 at the office of the Company at Salem, Oregon.

Exhibit No. 15. Of the official record of the minutes of the proceedings of the special meeting of the stockholders of the Oregon Central Railroad Company of Salem held March 28th, A. D. 1870 at 7 o'clock P. M.

Exhibit No. 16. Of an agreement entered into the 28th day of March 1870 between the Oregon Central

Railroad Company of Salem and the Oregon and California Railroad Company of Portland.

Exhibit No. 17. Of the recorded minutets of the proceedings of an adjourned meeting of the Board of Directors of the Oregon Central Railorad Company of Salem held at the office of the Company at 4 o'clock P. M. of March 29th, 1870.

Exhibit No. 18. Of minutes of the proceedings of an adjourned meeting of the stockholders of the said Oregon Central Railroad Company of Salem held at the office of the company at 3 o'clock P. M. of March 29th, 1870, and that each of said Exhibits may be offered, received and read in evidence in this suit upon the trial thereof, upon appeal and upon any hearing therein with the same force and effect and subject only to such objections for immateriality as might be made to the original minutes and agreements of which the same are copies if duly proved and offered in evidence.

W. H. EFFINGER,

Solicitor for Complainant.

DOLPH BRONOUGH & DOLPH & SIMON,

Attorneys and Solicitors for Defendants.

EXHIBIT "G"

CONVEYANCE

KNOW ALL MEN BY THESE PRESENTS, That we the undersigned Ben Holladay and Company of Portland, Oregon, in consideration of the cancellation this date of the Oregon Central Railroad Company at Salem, Oregon, of all certain contracts in writing heretofore existing between said Company and the undersign-

ed, in relation to the construction of a railroad and tele-
Exhibit graph line, from Portland, Oregon, through
No. 10. the Willamette, Umpqua and Rogue River
 Valleys to the California line, and the agree-
 ment of such Company to pay the undersign-
 ed for all moneys laid out, expended and in-
 curred under such contracts, to-wit: An amount not less
 than eight hundred thousand dollars, in U. S. Gold Coin;
 it being a part of the arrangement that all the property
 hereinafter specified should be transferred and delivered
 to said Company and in consideration of the full sum
 of one dollar to us in hand paid the receipt whereof is
 hereby acknowledged, have sold, assigned, set over,
 transferred, delivered, and conveyed, and by these pres-
 ents we Ben Holladay and Company do sell, assign, set
 over, transfer, deliver, and convey unto said Oregon
 Central Railroad Company of Salem, Oregon. All saw
 mills, and machinery connected therewith, all machinery,
 tools, implements, apparatus of every name and descrip-
 tion, all live stock, horses, mules, cattle, work oxen, carts,
 drays, wagons, gearing, tackle, and all leases, and all
 property of every name and nature now owned by and in
 possession of Ben Holladay & Co., all of such property
 being in the State of Oregon, principally in Multnomah
 and Clackamas Counties, the same being the mills, ma-
 chinery, tools, implements, apparatus, live stock, horses,
 mules, cattle, carts, drays, wagons, gearing tackle, rail-
 road ties, iron rail, spike, and other railroad materials
 now and heretofore used by us in the construction of the
 Oregon Central Railroad Company, it being the intention

of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon. To HAVE and to HOLD the said property and every part thereof unto the said Oregon Central Railroad Company of Salem, Oregon, its successors, and assigns, absolutely and forever.

IN WITNESS WHEREOF, we have hereto set our hands and seals this 28th day of March, A. D. 1870.

BEN HOLLADAY,

C. TEMPLE EMMETT.

By Ben Holladay, Att'y in fact.

BEN HOLLADAY & CO.

By Ben Holladay.

(Five cent U. S. Rev. Stamp Cancelled.)

(Exhibit 21 to testimony taken before Examiner.)

Filed Jan. 2, 1880. R. H. Lamson, Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Exhibit 21 with exhibit 10 attached thereto, the same being exhibit 21 to the testimony taken before W. B. Gilbert, Examiner, in cause No. 134, John Nightengale and Simon G. Elliott vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom. and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this October 7, 1911, A. D. 19....

(SEAL)

G. H. MARSH, Clerk.

[Complainant's Exhibit 54.]

In the Circuit Court of the United States

In and for the District of Oregon.

John Nightingale and Simon G. Elliott

Pltffs.

vs.

The Oregon Central Railroad Company of Salem, The
Oregon and California Railroad Company,

Defts.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

To the Honorable: The Judges of the Circuit Court of the United States of America within and for the District and State of Oregon:

The Plaintiffs above named John Nightingale of the City and County of San Francisco, State of California, and Simon G. Elliott, railroad contractor and builder of North Weymouth in the State of Massachusetts, bring this suit against the defendants above-named, to-wit: The Oregon Central Railroad Company of Salem, a corporation organized and existing under the laws of the State of Oregon aforesaid, and The Oregon and California Railroad Company, a corporation organized and existing under the laws of the State of Oregon afore-

said, humbly complaining respectfully represent unto your Honors and aver and charge.

I.

That your orator John Nightingale is a citizen and resident of the State of California, United States of America, and that your orator Simon G. Elliott is a citizen of the State of Massachusetts, United States of America. And your orators further aver and charge that each of the said defendants above-named, is a corporation organized, created and existing under and by virtue of the laws of the State of Oregon, each having its principal place of business at Portland, in the State of Oregon, and within said circuit.

II.

And your orators further aver and charge that heretofore, to-wit; on the 22nd day of April, 1867, pursuant to the laws of the State of Oregon, there was duly organized and created, a corporation, known and designated as the "Oregon Central Railroad Company" for the purpose of constructing a railroad, with all the necessary branches, fixtures, buildings and appurtenances, from Portland in the State of Oregon southerly about three hundred miles, to the California State line; to maintain the said road in good condition and repair, and to employ the same in the transportation of passengers and freight. That the capital stock of said corporation was fixed at seven millions, two hundred and fifty thousand dollars, divided into shares of one hundred dollars each. That upon the organization of said corporation, a majority of said capital stock, to-wit: three thousand seven

hundred shares, were duly subscribed for by divers persons and firms.

And your orators further aver and charge: That there was duly issued by said corporation three thousand and seven hundred shares of its said capital stock, and that your orator Nightingale is and has been since the 18th day of December 1870 the bona fide owner and holder of said 3700 shares; and of which your orator Nightingale's assignors were on the 30th day of June, 1867 the owners of said 3700 shares, which they duly assigned and transferred to your orator Nightingale; That your orator Elliott was on the 12th day of November 1869 and still is, the bona fide holder and owner of sixteen thousand shares of said capital stock. And your orators further aver and charge: That the said Oregon Central Railroad Company of Salem, caused and procured a survey of a route of its railroad to be made from Portland aforesaid, to the state line of California, and between its organization aforesaid and the 20th day of December 1869 constructed, completed and put in running order, a railway from East Portland in the State of Oregon, to Parrott Creek in the State of Oregon, a distance of about twenty miles.

III.

And your orators further aver and charge that a large number of shares of the capital stock of said Oregon Central Railroad Company, to-wit..... shares was prior to the 7th day of September 1869, duly issued and delivered to A. J. Cook & Co. of which firm your orator Elliott was a member and the general business manager.

That afterwards, to-wit, on or about the 7th day of September 1869, without any consideration having been paid therefore the said Oregon Central Railroad Company, by its, their directors who were the tools and confederates of one Benjamin Holladay, and who in all things pertaining thereto did his bidding, caused to be issued and delivered nominally to said Benjamin Holladay in the name of Ben Holladay and Company 39,930 shares of its capital stock. That prior to said last mentioned day, the said capital stock, so as aforesaid issued to said A. J. Cook & Co. and held and controlled and was owned by your orator Elliott, was delivered to and duly transferred on the books of the corporation of the said Oregon Central Railroad Company, to the firm of Ben Holladay and Company, then composed of Benjamin Holladay, C. Temple Emmett and your orator Elliott, and the same was on said last mentioned day, and ever since has continued to be in the actual possession of Benjamin Holladay as the representative of and assuming to act in reference thereto, in the name of Ben Holladay and Company composed of the individuals hereinbefore mentioned.

IV.

And your orators further aver and charge, That on the 16th day of March, 1870 there was organized and created under the laws of the State of Oregon, a corporation known as the "Oregon and California Railroad Company" the incorporators whereof were at the time of its commencement Benjamin Holladay, Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medoram

Crawford to have a corporate existence for ninety nine years, the object of said corporation was among other things to purchase take and receive of and from the Oregon Central Railroad of Salem, that portion of its railroad and telegraph line then completed together with all the rights real personal and mixed together with all the franchises of said Oregon Central Railroad Company, and particularly to take from said Oregon Central Railroad Company all its right title and interest then present or prospective in and to certain lands granted by the Congress of the United States to aid in constructing said Railroad.

That the capital stock of said Oregon and California Railroad Company was and is twenty millions of dollars divided into shares of one hundred dollars each. Your orators further represent unto your Honors that hereafter when the said Oregon Central Railroad Company is mentioned it shall be designated by the two capital letters O. C. and the Oregon and California Railroad Company will in like manner be designated by the two letters O. and C.

V.

And your orators further aver and charge that under and by virtue of a certain Act of Congress of United States passed on the 25th day of July, 1866, and the acts amendatory thereof, a large number of acres of land to-wit 256,000 acres per mile were granted to such corporation as might be selected or designated by the Legislature of Oregon to aid such selected Company in the construction and equipment of a Railroad and Telegraph

line from the Central Pacific Railroad in California to Portland, Oregon. And your orators aver and charge that after the organization and incorporation of said O. C. the Legislature of the State of Oregon did by joint resolution on the 20th day of October 1868 duly designate said O. C. as the corporation to take manage and receive the benefits of said Act of Congress before referred to and the acts supplemental thereto; that thereafter and prior to the 25th day of July, 1867 the said O. C. did duly file its assent in writing to said several acts of Congress and each and all of the provisions thereof, in the office of and with the Secretary of the Interior of the United States of Aemrica at Washington D. C.; that thereafter and prior to the 29th day of March, 1870, to-wit, prior to the 25th day of December, 1869 said O. C. did survey and designate its route and line of railway and telegraph from Portland aforesaid to a point on the state line of the State of California, to-wit, at Pilot Rock, and did on or about the 29th day of July, 1867, and prior to the 20th day of December, 1869 complete and prepare such survey and a map thereof, and file the same in the office of the said Secretary of the Interior; that on the 22nd day of April, 1867, and prior to the 25th day of December 1869, the said O. C. did construct a railroad and telegraph line for the distance of twenty miles and upwards on the line of said survey, to-wit, from East Portland in Multnomah County, State of Oregon southerly to Parrott Creek, that said railroad and telegraph line for the distance last aforesaid, and on the route aforesaid, was in all respects con-

structed furnished and equipped in strict conformity with the laws of the State of Oregon and as required in and by said several Acts of Congress before referred to.

VI.

And your orators further aver and charge: that thereafter and on and about the 25th day of December 1869 the Commissioners duly appointed pursuant to the provisions of the Act of Congress aforesaid whereunder the lands aforesaid had been granted to said O. C. examined the twenty miles of railorad and telegraph line so as aforesaid constructed by said O. C. from Portland aforesaid southerly to Parrott Creek aforesaid, and determined and made their report under oath to the President of the United States of America in substance to the effect that said road and telegraph line had been constructed, furnished and equipped pursuant to the laws of the State of Oregon aforesaid, and pursuant to the said acts of Congress prior to the 25th day of December, A. D. 1869, which report was so made or on about the first day of January, 1870, and was accepted and approved of by the then President of the United States of America whereby and by virtue of said Acts of Congress hereinbefore referred to the said O. C. became and was on said last mentioned day entitled to four hundred sections, or 256,000 acres of land of great value, to-wit of the value of six hundred and forty thousand dollars (\$640,000.00-100.)

VII.

And your orators further aver and charge. That on the 23rd day of April 1867 the said O. C. and Albert

J. Cook entered into a written contract for the construction and equipment of its railroad from Portland aforesaid southerly a distance of one hundred and fifty miles on the line of the route so as aforesaid surveyed and adopted by said O. C. for the agreed compensation of \$5,250,000.00-100 dollars, and the said O. C. immediately after the making and signing of said contract delivered to said Albert J. Cook the same, who thereafter to-wit on the 2nd day of May 1867 transferred and delivered all his right title and interest therein to your orator Elliott and transferred along therewith to your orator aforesaid two millions of the preferred stock of said O. C. which said stock had been by said O. C. paid and delivered to said Albert J. Cook on the 23rd day of April, 1867 in pursuance of the contract and agreement aforesaid. Afterwards to-wit on the 20th day of March, 1868 your orator Elliott assigned seven twentieths an undivided interest in said contracts to one N. P. Perrine reserving however to himself all the said last named stock.

VIII.

And your orators further aver and charge that after the last aforesaid contract was entered into as aforesaid the said O. C. and A. J. Cook & Co. on the 12th day of May 1867 made and entered into another agreement to build and equip two hundred and ten miles fore of the railroad aforesaid from the point at the termination of the first 150 miles on southerly to the state line of California upon the route of the said railroad from Portland as aforesaid—which said last agreement was also

assigned by said A. J. Cook and Co. to your orator Elliott, and your orator aforesaid subsequently assigned the two said contracts and agreement to the firm of Ben Holladay and Company—which was composed of said Ben Holladay, C. Temple Emmet and your orator as aforesaid, prior to the 1st of September 1869.

IX.

And your orators further aver and charge that after the said assignments the said firm of Ben Holladay and Company executed and delivered a bond to E. N. Cooke and others stockholders in the said O. C. wherein said obligors undertook to save all said obligees stockholders as aforesaid harmless as such stockholders, which said bond was so executed on the 7th day of September 1869, and was by said obligees accepted on the day last aforesaid.

X.

And your orators further aver and charge that on the 7th day of September, 1869, the said E. N. Cook, George L. Woods, J. H. Moores, John F. Miller, Jacob Conser, J. H. Douthitt, A. L. Lovejoy, I. R. Moores, J. H. Foster, J. C. Hawthorne, George Weidler, A. Bush, part of the obligees in said bond of indemnity and one George E. Cole, the being directors of the said O. C. and nominally owning and professing to own the number of its capital stock set opposite their names, and in fact not professing to own, and not owning any other or greater number of shares of such capital stock, namely,

E. N. Cook	one share
George L. Woods	one shares
I. R. Moores	one share

John F. Miller	one share
Jacob Conser	one share
J. H. Douthitt	one share
A. L. Lovejoy	one share
J. H. Moores	one share
J. H. Foster	one share
J. C. Hawthorne	one share
George N. Weidler	one share
A. Bush	one share
George E. Cole	one share

But in truth and in fact having no interest in such stock, but holding the same for the sole use and benefit of Benjamin Holladay hereinbefore named; and to enable them to act as directors of said O. C. held a meeting as such directors and passed and caused to be entered on the minutes of said O. C. a resolution directing the Secretary of said board to issue forthwith to Benjamin Holladay thirty nine thousand nine hundred and thirty shares of the original capital stock of said O. C. the same being the remaining shares of the original seventy thousand originally subscribed.

And in pursuance of said resolution and by no other authority whatever, the aforesaid board of Directors, who then were all acting under the dictation, and as the tools and confederates of the said Benjamin Holladay, caused to be issued and actually delivered to said Holladay thirty nine thousand nine hundred and thirty shares of the capital stock of the said O. C. mentioned in said resolution. That the same were so issued and delivered without any consideration of any sort moving from said

Holladay, or any other person or corporation therefor or paid to or received by said O. C.; but the same which was a majority of the whole capital stock was issued and delivered as aforesaid with the intent and design only to enable said Holladay to carry into effect the fraudulent schemes and contrivances to be hereinafter set out and averred.

XI.

And your orators further aver and charge that on and prior to the 7th day of December, 1869, the said Benjamin Holladay had, by various devices and contrivances unknown to your orators, become possessed of and there was standing in his name and in the names of others his confederates, the then acting officers of said O. C. all the shares of the capital stock of said O. C. issued or provided to be issued by it except the number of shares particularly enumerated and specified in schedule "F" hereto annexed and prayed to be read as part hereof, which last mentioned shares were then held and owned by the several persons named in said schedule "F" each of said persons owning the number of shares set opposite their names in said schedule "F."

XII.

And your orators further aver and charge that they bring this suit and prosecute the same as well on their own behalf as on behalf of all the other stockholders of the said O. C. who choose to come in and contribute to the expense of prosecuting the same, and that they have requested said O. C. and its board of directors, to-wit, the said board as the same existed at the date of the in-

denture of conveyance to be hereinafter specifically set out, by the said O. C. to the Oregon and California Railroad Company, to institute and prosecute this action or some similar action in the name of the said O. C. as Plaintiffs against the Oregon and California Railroad Company defendant, to obtain the judgment and relief herein sought and prayed for for the benefit general of the stockholders of said O. C.; but said O. C. and its directors and officers acting under the advice and at the instigation of said Holladay, C. Temple Emmett and defendant The Oregon and California Railroad Company and their confederates have hitherto and do still refuse to institute or prosecute any suit for the relief or any part of the relief sought and prayed for by this your orator's bill of complaint.

XIII.

And your orators further charge and aver that said Benjamin Holladay combining and confederating with the then directors of said O. C. hereinbefore mentioned and who each held out one share of stock as aforesaid, he the said Holladay the while falsely pretending to have the control of the contracts and agreements aforesaid between the said O. C. and the said A. J. Cook and said A. J. Cook & Co. on or about the 7th day of September 1869, surrendered nominally the said contracts and agreements to said O. C. and cancelled or attempted to cancel and annul the same; and the said Holladay and C. Temple Emmett on said 7th day of September 1869 by the aid and connivance of their confederates the aforesaid directors of said O. C., nominally surrendered to

said O. C. and nominally cancelled with consent of said O. C. as evidenced by a resolution of said board of directors, but against the consent and will and without the knowledge of your orator Elliott or the assignors of your orator Nightingale, all the shares of the capital stock of said O. C. except the shares enumerated in aforesaid schedule "F" appended hereto; and there is not, in fact outstanding any shares of such capital stock, except those mentioned in said schedule "F" and the shares of your orator Elliott which the said Holladay obtained possession of from your orator Elliott, and which he illegally fraudulently and with intent to cheat and defraud your orator Elliott, so as aforesaid assumed, pretended, and attempted to surrender and cancel.

XIV.

And your orators further aver and charge: That on the 27th day of March, 1870, the said O. C. corporation acting by said I. R. Moores and George E. Cole, undertook to execute and deliver, and said last named persons did in fact sign and affix the corporate seal of said O. C. to, and did deliver to said Benjamin Holladay an indenture whereby the said O. C. undertook to grant and convey to said O. and C. all and singular the Railroad and Telegraph line of said O. C. together with all and singular the rights and franchises of every description then of right belonging to or vested in said O. C. and along therewith all the property both real and personal of said O. C.; that under said indenture and not otherwise the said O. and C. and said Holladay on the 30th day of May, 1870, took possession of all and singular the road-

bed, railway, depots and other property and franchises and subsidies which on said day were the property of said O. C. and from thence he and said O. and C. and its confederates and assigns have assumed control possess and manage the same for his and their own benefit, to the exclusion of your orators and the bona fide stockholders of the said O. C.; and that said Holladay and his confederates assuming to have, and appearing on the books of said O. C. to have a majority of the stock of said O. C. procured fraudulently the passage of a resolution by the board of directors of said O. C. authorizing the execution of the indenture last aforesaid.

XV.

And your orators further aver and charge: That your orators did not, nor did either of them, nor did any assignor or vendor of your orators or either of them from whom they or either of them deraign title to any of the shares of the capital stock of the said O. C. consent to ratify or approve of, at the time or at any other time, the sale and transfer so attempted to be made as just hereinbefore set out; That your orators were not, nor were any of the assignors or vendors of the capital stock of the said O. C. owned by your orators or by either of them present at the meeting of stockholders at which said pretended sale and transfer was nominally authorized.

XVI.

And your orators further aver and charge: That none of the stockholders of said O. C. mentioned in schedule "F" were present at said last mentioned meeting of

stockholders held 28th March 1870, nor has either of said stockholders or their assigns assented to or in any way ratified or approved of said attempted sale and transfer, or of the proceedings of said meeting so held as aforesaid on the 28th March 1870; that there were only present at said stockholders meeting the stockholders hereinbefore referred to, to-wit: Ben Holladay & Company falsely pretending by Ben Holladay to be the owners of 64,661 shares; J. H. Douthitt, J. H. Moores, I. R. Moores, E. M. Cook, A. L. Lovejoy, Geo. L. Woods, John F. Miller, Geo. W. Weidler, A. Bush, J. C. Hawthorne, George E. Cole, Jacob Conser and J. H. Foster, each owning but one share; that said Hawthorne, Ben Holladay and I. R. Moores who were present at said meeting and voted thereat for said resolution are the same persons who on the same day were acting as corporators and officers and stockholders in said O. and C.; that said Holladay was President of said O. and C. and one of the Board of Directors and said Hawthorne & Moores were two directors thereof.

XVII.

And your orators further aver and charge: That the property rights franchises and subsidies purporting to have been transferred and conveyed by the said indenture from said O. C. to said O. and C. were on said 28th day of March 1870 of great value; to-wit, of the value of seven millions of dollars; and still are of that value, that the said Ben Holladay did not pay, nor has the said O. and C. agreed to pay or actually paid to the said O. C. any money or other valuable thing for said pretended

sale and transfer so made as aforesaid; nor have said Holladay or said O. and C. paid any debts or liabilities of said O. C. otherwise than by a delivery of a portion of the bonds secured by a mortgage given by said O. and C. to Milton S. Latham and Faxon D. Atherton or by money realized from the sale of said bonds.

XVIII.

And your orators further aver and charge: That the said O. C. by the machinations and contrivances of said Holladay and the said directors hereinbefore mentioned in effect practically ceased to exist on the 1st day of April 1870, since which time there has not been an election of directors; nor a meeting of stockholders; nor any business conducted or carried on by it. That it was the intent and design of said Ben Holladay and his confederates that the same should cease to exist and be swallowed up and absorbed by the said O. and C.; and that said O. and C. was organized and incorporated by said Holladay, C. Temple Emmet and their confederates solely for the consummation of the aforesaid intent and design.

XIX.

And your orators further aver and charge: That upon the execution of the said pretended conveyance from said O. C. to said O. and C. the said O. and C. and its managers and officers took possession of all the property franchises subsidies rights privileges and appurtenances of the said O. C. purporting to have been conveyed as aforesaid to said O. and C. towit of the road-bed, railway, depots, tracks, turntables, switches, freight houses, passenger depots, cars, engines and other furniture and

equipage, land and other property, so far as the same was owned and controlled by said O. C. at the time of the execution and delivery of said purported conveyance by said O. C. to said O. and C. and thereafter said O. and C. after having mortgaged the property so as aforesaid, conveyed to it by said O. C. had proceeded to construct a railway from the then terminus of the said O. C. railway so far as the same was completed upon the route and line of survey so as aforesaid selected and adopted by said O. C. southerly towards the state line of California and have completed about miles more or less of a railway upon said line and route of said O. C. and said O. and C. is now engaged in running and operating the railroad so as aforesaid thus far completed and is transporting thereon passengers freight mail matter and express matter, and is receiving therefor and has been since the beginning thereof large sums of money per month, to wit twelve thousand dollars per month.

XX.

And your orators further aver and charge: That the said C. Temple Emmett and the mortgagees of said O. and C. just hereinbefore referred to are not residents of the State of Oregon for which reason they are not made parties to this bill.

XXI.

And your orators further aver and charge: That they are advised, and they therefore show unto your Honors that the aforesaid pretended sale and transfer from the said O. C. to the said O. and C. was and is null and void

as against your orators, and as against each and every stockholder of said O. C. who did not assent thereto or who has not subsequently ratified and approved the same, that the said pretended sale was illegal and fraudulent.

XXII.

And your orators further aver and charge: That the said O. and C. threatens to and has already disposed of some of the lands granted as hereinbefore set out by Act of Congress, and will dispose of and sell all the said lands unless restrained by this Honorable Court; that the said Ben Holladay has been from the incorporation thereof the President of said O. and C.; that he has uniformly and all the time controlled and shaped and determined its policy; that he has absolutely managed its entire business affairs constructing its road running the same and receiving the money returns therefrom; and that he is wasting and destroying the valuable rights properties and franchises which of right belong to the stockholders of the said O. C. and diverting and appropriating the same to his own individual use and emolument.

WHEREFORE, The premises considered your orators submit to your Honors that an injunction to restrain the defendant the said O. and C. its agents employees officers and servants, from selling or conveying the lands so as aforesaid, or any part or parcel thereof to any person or corporation other than the said O. C. should be awarded to your orators by this honorable court; and also that such injunction to restrain the said

defendant the O. and C. its agents, officers and servants from selling conveying or transferring the road-bed railway track and its appurtenances and any and all other property rights and franchises acquired or purporting to have been acquired by and under the conveyance hereinbefore mentioned from the O. C. to said O. and C. should be awarded.

That your orators prior to the institution of this suit, on or about the 20th day of May 1871 and at other times applied and caused appliances to be made to each of said defendants and their agents by letter and otherwise, requesting them and each of them to act to your orators in an honorable and just way and to desist from the unreasonable and unjust practices herein mentioned; And your orators had well hoped that such their reasonable request would have been complied with. But now so it is, that the said defendants combining and confederating with divers other persons, now unknown to your orators, and particularly with said Benjamin Holladay, contriving how to injure and wrong your orators have absolutely refused to comply with such reasonable request of your orators.

And the said defendants sometimes pretend that the said alleged transfer and conveyance from the said O. C. to the said O. and C. is valid and binding in law, not only as between the said O. C. and the said O. and C., but also as against your orators and each and all the other stockholders of the said O. C., who did not vote in favor of said transfer and conveyance and who have not heretofore ratified approved or consented thereto:

Whereas your orators charge the direct contrary thereof to be the truth, and charge that the said conveyance was and is illegal, invalid and void in every respect as against the stockholders of said O. C. and especially as against your orators and all other stockholders who were not present at and who did not participate in the stockholders meeting which attempted to authorize said transfer and conveyance. And the said defendants sometimes pretend that your orators are not entitled to the relief sought by this bill or to any part thereof. Whereas your orators charge the direct contrary thereof to be true and charge that the pretended conveyance aforesaid is null and void and should of right be so declared held and treated by this honorable Court.

And your orators charge further that there are now in possession of each of said defendants or under its control some writings, deeds, books, papers, memoranda, letters, receipts, tickets, vouchers or papers having relation to or connection with the matters herein set out, whereby the truth or falsity of the statements herein can be made manifest and your orators here seek from said defendants description and full particulars of all such papers and documents touching the transactions herein detailed so as that by the contents of said schedule may appear for inspection of your Honors the whole substantially of said documents and papers. All of which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In tender consideration whereof, and for as much as your orators are

remediless at and by the strict rules of the common law; and cannot have adequate relief save in a court of equity where such matters are properly cognizable and relievable to the end therefore that said defendants may if they can show why your orators may and should not have the relief herein prayed for, and may upon their several oaths, and according to the best of their knowledge remembrance, information and belief, full direct and perfect answer make to such of the several interrogatories hereinafter mentioned, they are respectfully requested and by leave of your Honors required to answer, that is to say:

1st. Whether it is not a fact that the said O. C. was duly incorporated as a body politic and corporate by and under and in strict accordance with the laws of the State of Oregon, at the time charged and averred in this bill of complaint?

2nd. Whether or not the said O. C. did in fact make the conveyance to the said O. and C. in manner and form as herein charged? and if any then how and in what manner and by what authority said conveyance and transfer was made?

3rd. Whether it is not a fact that the vote of the directors of the said O. C. attempting to authorize the said conveyance and transfer was dictated and procured to be had by the said Benjamin Holladay and C. Temple Emmet or one of them, and whether such directors were not in said vote the accomplices and confederates of said Benjamin Holladay and C. Temple Emmet or one or either of them?

4th. Whether it is not a fact that at the time the alleged stockholders of said O. C. purport to have voted for the resolution authorizing said alleged transfer and conveyance, the said Benjamin Holladay and C. Temple Emmet controlled and assumed to vote and did in fact vote more than two thirds of the capital stock of said O. C. while at the same time the said Holladay and Emmet were the owners and holders of a large majority of capital stock of the said O. and C. and officers and managers thereof?

5th. Whether it is not a fact that all the property rights privileges franchises and appurtenances now in the possession and under the control of the said O. and C. is the same property rights privileges franchises and appurtenances which belonged to the said O. C. at and prior to the said pretended conveyance by it to the said O. and C.? And that the defendants hereto may answer the premises and also all the matters and interrogatories herein specifically and in detail, and that the said defendant the O. and C. may be restrained by the injunction of this honorable court from leasing, selling, conveying or in any wise encumbering the railway, franchises and privileges and the lands granted by the several Acts of Congress, or any part thereof during the pendency of this suit.

And that during the pendency of this suit there may be appointed by this Honorable Court a Receiver to take possession of and hold safely, till the end hereof all the property, rights, railway and appurtenances thereof, now in the possession of said O. and C. And that

the said defendant the said O. and C. be adjudged and decreed to convey, transfer and deliver possession to the said O. C. of all and singular the lands granted by said Acts of Congress to aid in the construction of said railway part of which has been built by said O. C. and part by said O. and C.; its furniture and equipage, railway, roadbed, depot houses, cars, railroad track &c, and all appurtenances thereof, and such other and further relief as to this honorable court should seem meet and proper.

May it please your honors to grant unto your orators the relief just hereinbefore prayed for; to compel and require the said O. and C. to convey unto the said O. C. the property rights franchises lands and privileges aforesaid; to issue out of this Honorable Court a writ of injunction to restrain said O. and C. all its servants agents and officers from conveying or attempting to convey the lands aforesaid or any part thereof the said railway road bed furniture &c now in the possession of said O. and C. and also to issue or cause to be issued a writ or writs of subpoena to be directed to the said O. C. and the said O. and C. thereby commanding them at a day certain and under a certain penalty to appear before your Honors and then and there full true direct and perfect answer to make to all the matters and statements herein in this amended bill of complaint and to abide and perform such further order or decree as to your Honors shall seem meet. And your orators will ever pray.

WM. H. EFFINGER,

Sol. for Pltffs.

Schedue "F" referred to and made part of the annexed bill of complaint, showing the outstanding stock of the Oregon Central Railroad Company, whose owners did not assent to the sale and transfer of the said O. C. to the said O. and C.

Flint Peabody & Co, one hundred thousand dollars.

S. F. Elliott, one hundred thousand dollars.

E. B. Satterlee, one hundred thousand dollars.

Gen. B. F. Pratt, ten thousand dollars.

John J. Kroner, ten thousand dollars.

N. P. Perrine, ten thousand dollars.

J. S. Emery, fifty thousand dollars.

D. P. Emery, ten thousand dollars.

Mr. Parker, ten thousand dollars.

Estimating said stock at the par or nominal value thereof.

W. H. EFFINGER,

Solicitors for Complainants.

AMENDED BILL

Filed August 11, 1873

Ralph Wilcox ,Clerk

UNITED STATES OF AMERICA,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Amended Bill of Complaint, in Cause No. 134, John Nightengale and Simon G. Elliott, vs. Oregon Central Railroad Company and Oregon and California Railroad Company has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as

the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this October 7, A. D. 1911.

(SEAL)

G. H. MARSH, Clerk.

By Deputy Clerk.

OREGON & CALIFORNIA RAILROAD COM-
PANY.

Land Department.

8th Floor, James Flood Building

Charles W. Eberlein,

Acting Land Agent.

[Complainant's Exhibit 55.]

San Francisco, Cal., February 20, 1907.

Hon. Wm. D. Fenton,

Fenton Building,

Portland, Oregon.

Dear Sir:—

I am in receipt of your letter of February 18, 1907, enclosing the following documents:

1. "Statement No. 1 showing by counties the assessment upon Congressional Lands of the O. & C. R. R. Co. from 1891 to 1904, inclusive."

2. "Statement No. 2 showing by counties the assessed valuation of miscellaneous lands and lots formerly standing in the names of Geo. H. Andrews and R. Koehler, Trustees, together with taxes paid thereon from 1891 to 1904, inclusive."

I wish to thank you for sending these to me, and I will have copies of same made and return the originals to you with in a short time.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

[Complainant's Exhibit 56.]

OREGON & CALIFORNIA RAILROAD COMPANY.

Land Department.

8th Floor, James Flood Building

Charles W. Eberlein,
Acting Land Agent.

San Francisco, Cal., January 10th, 1908.

Hon. W. D. Fenton,
Fenton Building, Portland, Ore.

Dear Sir:—

I enclose you herewith voucher, department No. 0-490, for \$60.00, favor Clackamar Title Company, Portland, Oregon, for payment for furnishing abstract of title to E $\frac{1}{2}$ of SE $\frac{1}{4}$, and lots 5 and 6, Sec. 29 and N $\frac{1}{2}$ of NE $\frac{1}{4}$, section 32, township 1 south, range 2 east, W. M., and 14 acres in the Alfrey Donation Land Claim.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

1542 *The Oregon & California Railroad Co.*

encl. (1).

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

[Complainant's Exhibit 57.]

OREGON & CALIFORNIA RAILROAD COM-
PANY.

Land Department.

8th Floor, James Flood Building

Charles W. Eberlein,

Acting Land Agent.

San Francisco, Cal., October 10, 1907.

Hon. Wm. D. Fenton,

Fenton Building,

Portland, Oregon.

Dear sir:

I am in receipt of your letter of October 5, 1907, relative to the Ben Holladay tract and New Era Park. We have no abstract of these two parcels, and I think it advisable, as you suggest, that abstracts be procured if the expense attending same is not too great—as to that, of course we defer to your judgment.

I will, as you request, have the examination made of these tracts and furnish you with copy of report.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk of U. S. District Court.

[Complainant's Exhibit 58.]

OREGON & CALIFORNIA RAILROAD COMPANY.

8th Floor, James Flood Building
Land Department.

Charles W. Eberlein,
Acting Land Agent.

San Francisco, Cal., November 11, 1907.

Hon Wm. D. Fenton,
Fenton Building,
Portland, Oregon.

Dear Sir:

I am in receipt of your letter of October 25, 1907, inclosing copy of letter from Clackamas Title Company, quoting prices for furnishing abstracts of title to the New Era Park tract, not to exceed \$50, and for the Holladay tract not to exceed \$20.

Please procure these abstracts at the lowest price at which you can obtain them.

Referring to your letter of October 5, 1907, I wish to state positively that your recollection regarding action taken with reference to the Ben Holladay tract is correct. A considerable time prior to the fire, you advised that it was desirable that the company should assert possession to this tract, by reason of defective record title and, on your advice, we had the whole tract fenced, at a cost of over \$400.

Yours truly,
CHARLES W. EBERLEIN,
Acting Land Agent.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

[Claimant's Exhibit 59.]

CLACKAMAS COUNTY

W. L. Mulvey
County Clerk
Oregon City, Oregon

September 22d, 1911.

To the Examiner, in the matter of the suit: Maria
Grubbisch vs. Oregon and California Railroad
Company.

Dear Sir:

Pursuant to the instructions of the Court on September 21st, 1911, relative to the land in controversy, viz: E $\frac{1}{2}$ of SE $\frac{1}{4}$ and Lots 5 & 6 of Section 29, and N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Section 32, all in township 1 South, Range 2 East, W. M., Clackamas County, Oregon, I am pleased to submit the following data.

There appears no record of the assessment and taxation of the lands in question prior to the year 1873.

For the year 1873 I find the lands assessed in the name of the Oregon and California Railroad Company to an amonut of \$1920.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2308.41, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consid-

eration I have figured the tax on the lands in question to be approximately \$36.48.

For the year 1874 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$1600.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2319.66, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$29.60.

For the year 1875 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$975.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2265.17, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$18.53.

For the year 1877 there appears no record of assessment of these lands so far as I can determine from the tax roll.

For the year 1878 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$970.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount

\$2661.12, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$20.37.

For the year 1879 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$970.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2671.62, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$20.37.

For the year 1881 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$1600.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$3316.43, and is marked paid on the tax roll for that year. By taxing the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$33.60.

For the year 1882 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$1600.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount

\$2449.70, and is marked paid in the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$32.00.

For the year 1883 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$1600.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2695.77, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's property into consideration I have figured the tax on the lands in question to be approximately \$19.38.

For the year 1884 I find the lands assessed in the name of the Oregon and California Railroad Company to an amount of \$1600.00. The tax on the tract was included with that covering other holdings of the Oregon and California Railroad Company, in amount \$2220.03, and is marked paid on the tax roll for that year. By taking the total valuation and the total taxes paid on all of the Company's holdings into consideration I have figured the tax on the lands in question to be approximately \$28.80.

For the year 1876, omitted above, I find the lands assessed to the Oregon and California Company to an amount of \$970.00 and a tax of \$17.46 marked paid on the tax roll.

For the year 1910, which year's assessment and record of taxes were inadvertently overlooked yesterday, I find the land in question to be assessed in the name of Ben Holladay & Co. to a valuation of \$16000.00. Net taxes in the sum of \$480.05 are entered against the valuation mentioned and the roll bears the notation, under "Date of Payment," 3-14-11. The receipt number covering the payment is 5483 and reference to carbon copy of the same, bearing like number, shows an amount of \$480.05 paid on the lands in question by "blank."

Trusting that this information is all that you desire in the premises, I am,

Yours truly,

W. L. MULVEY,

County Clerk of Clackamas County.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

[Complainant's Exhibit 61 A.]

*In the Circuit Court of the United States
for the District of Oregon*

John Nightingale and Simon G. Elliott

Complainants,

vs.

The Oregon Central Railroad Company of Salem, and
The Oregon and California Railroad Company,
Defendants.

Filed Feb. 13, 1912, A. M. Cannon, Clerk U. S. District Court.

THE ANSWER of the Oregon Central Railroad Company of Salem and The Oregon and California Railroad Company, Defendants, to the Amended Bill of Complaint of John Nightingale and Simon G. Elliott.

The said defendants The Oregon Central Railroad Company of Salem, and The Oregon and California Railroad Company, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be taken to the many errors, uncertainties and other imperfections in said Complainants said Amended Bill of Complaint contained, and to the jurisdiction of said Court, and the defects of parties defendant herein, for answer thereto or unto so much and such parts thereof as these Defendants are advised is or are material or necessary for them to make answer unto, Answering, say:—

They deny that the Defendant The Oregon Central Railroad Company of Salem is or ever was a Corporation organized under the laws of the State of Oregon or otherwise, and they deny that heretofore, to-wit: on the 22nd day of April, 1867, or at any other time, pursuant to the laws of the State of Oregon, or otherwise, there was duly organized a corporation known or designated as the Oregon Central Railroad Company, for the purpose of constructing a Railroad with all necessary branches, fixtures, buildings and appurtenances, from Portland in the State of Oregon, southerly about three hundred miles, to the California State line; to maintain the said road in good condition and repair, and to employ the same in the transportation of passen-

gers and freight, or for any other purpose.

They deny that the Capital Stock of any such duly organized Corporation was fixed at Seven Millions Two Hundred and Fifty Thousand Dollars, or any other sum, divided into shares of One Hundred dollars each, or otherwise, but Defendants admit that the Capital Stock of said pretended Corporation was fixed in its Articles of Incorporation at Seven Millions, Two Hundred and Fifty Thousand Dollars, divided into shares of One Hundred dollars each. And they deny that upon the organization of said Company, or at any other time, a majority of the Capital Stock of said Company, to-wit: Three Thousand Seven Hundred shares, or any greater number of shares than was duly, or otherwise, subscribed for by divers persons or firms, or otherwise. And they deny that Three Thousand Seven Hundred Shares are a majority of the Capital Stock of said pretended Corporation.

And Defendants further deny that there was duly issued by said Defendants, The Oregon Central Railroad Company, Three Thousand and Seven Hundred Shares of its said Capital Stock, or any other number of shares thereof. They deny that said Plaintiff John Nightingale is or has been since the 18th day of December 1870 the bona fide owner or holder, or the owner or holder at all, of said 3700 Shares, or any shares whatever, and deny that Plaintiff Nightingale's assignors were on the 30th day of June, 1867, or at any other time, the owners of said 3700 shares, or any shares whatever. And these Defendants deny that they, said Assignors

duly assigned or transferred any such shares to Plaintiff Nightingale. Deny that Plaintiff Elliott was on the 12th day of November 1869, or still is, or ever was, the bona fide holder or owner of Sixteen Thousand shares, or any number of shares, of said Capital Stock. Deny that said Defendant the Oregon Central Railroad Company was ever duly or legally organized or that between its organization and the 20th day of December 1869 it constructed, completed or put in running order a Railway from East Portland in the State of Oregon to Parrot Creek in the State of Oregon. These Defendants admit that said portion of the Oregon Central Railroad was constructed prior to Dec. 25th 1869, as hereinafter stated.

And these Defendants, further answering said Amended Bill, deny that a large number of shares of the Capital Stock of said Oregon Central Railroad Company, to-wit:shares, or any shares whatever, was, prior to the 7th day of September, 1869, or at any other time, duly or legally issued or delivered to A. J. Cook & Co. They deny that afterwards, on or about the 7th day of September, 1869, or at any other time, without consideration having been paid therefor, the said Oregon Central Railroad Company Defendant by its then Directors, or otherwise, caused to be issued or delivered nominally to said Benjamin Holladay in the name of Ben Holladay & Co., or otherwise, 39,930, or any number whatever, of shares of its Capital Stock. These Defendants deny that prior to said last mentioned day, or ever, any Capital Stock of said Oregon Central Railroad

Company, issued to said A. J. Cook & Co., or held, controlled or owned by Plaintiff Elliott, was delivered, or duly or legally transferred upon the Books of said Company, to the firm of Ben Holladay & Co., and deny that any such Stock of said Corporation was, on said last mentioned day, or ever since has continued to be, in the actual possession of Ben Holladay as representative of Ben Holladay & Co., or otherwise. Deny that the Directors of said Oregon Central Railroad Company were, on or about the 7th day of September, A. D. 1869, or at any other time, tools or confederates of one Benjamin Holladay, or that they in all or any things did his bidding. Defendants admit that Certificates for said number of shares of what was called non-assessable interest bearing Stock were delivered by said Elliott to said firm of Ben Holladay & Co., but these Defendants allege that said Certificates were void and did not actually represent any Stock of said Company, for reasons hereinafter stated.

And these Defendants, further Answering, aver that on said 7th day of September, 1869, said Plaintiff S. G. Elliott was present at the meeting of the Board of Directors of said Oregon Central Railroad Company at which the resolution authorizing the issuing of said 39,930 shares of Stock to Ben Holladay & Co. was passed and had full knowledge of all the proceedings then had, and consented to said proceedings and aided in procuring the said Certificate for said Stock to be issued. That it was the intention at that time, both of the firm of Ben Holladay & Co. and of the Board of Directors

of said Oregon Central Railroad Company, that said 39,930 shares of stock should be issued to Ben Holladay & Co., but through inadvertence a certificate in form for said shares of Stock was issued to said Ben Holladay as hereinafter stated.

And these Defendants, further answering, allege that said 39,930 shares of stock were procured to be issued to said Ben Holladay & Co. in good faith and for a good and sufficient consideration; that said Ben Holladay & Co., in consideration thereof, in addition to such obligations and liabilities as they as stockholders of said Company assumed, agreed to pay, and did pay, the indebtedness of said Oregon Central Railroad Company, amounting to over \$20,000.00-100, except the indebtedness arising under the contracts for construction of its said road, then held by Ben Holladay & Co., as hereinafter stated, and the sole object of procuring said stock was the hope of giving thereby credit to said Company and being enabled to negotiate said Bonds.

And these Defendants, further answering, admit that under and by virtue of the laws of the State of Oregon there was organized, on or about the 17th day of March 1870, a Corporation known as the Oregon and California Railroad Company, and that the incorporators thereof were Benjamin Holladay, Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medoram Crawford, and that, as specified in the Articles of Incorporation, said Oregon & California Railroad Company was to have a Corporate existence of Ninety-nine years, and that the Capital Stock of said Oregon and California Rail-

road Company was and is Twenty Millions of Dollars, divided into shares of One Hundred Dollars each.

And these defendants aver that said Oregon and California Railroad was, on or about said 17th day of March in all respects duly and legally incorporated and organized. And Defendants aver that the objects of the incorporation of said Oregon and California Railroad are not fully stated in said Amended Bill, but these Defendants aver that the object of the incorporation of said Company, as specified in its articles of incorporation of said Company, was and is to construct a Railroad and Telegraph line, with all the necessary branches, side tracks, fixtures, buildings, depots, stations and appurtenances, from Portland, in the State of Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River Valleys to the California line on the Southern boundary of Oregon, to connect with the Railroad and Telegraph line now being constructed northerly through the State of California by the "California and Oregon Railroad Company" towards the southern boundary of Oregon, and to purchase, own, construct, hold, equip, operate and use all necessary ferries on the line of such Road over the Willamette and other rivers, and over any river or rivers, on either side of the line of such Railroad, which may be necessary or proper in crossing freight and passengers to and from the said Railroad; to maintain the said Railroad and Telegraph line in good order, condition and repair, and to operate the said Railroad and

employ the same, and the said Telegraph line, in the business of transporting passengers and freight and the United States mails, and for the purposes aforesaid to purchase, take and receive of and from the "Oregon Central Railroad Company" of Salem, Oregon, incorporated April 22nd, 1867, that portion of its Railroad and Telegraph Line now completed, together with all the property, real, personal and mixed, and right of way of such last named Corporation of whatsoever name and nature, and all its rights and franchises of every name and nature, both legal and equitable, which the said last named Corporation now has or owns, or to which it is in any way or manner entitled, or hereafter may be entitled to,—whether the same is absolute or contingent, and particularly and especially all the right, title, interest, franchise, claim and demand which the said "Oregon Central Railroad Company" of Salem, Oregon, aforesaid, now has or is entitled to, and to which it may hereafter be entitled, under and by virtue of an Act of Congress, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from the Central Railroad in California to Portland, in Oregon." approved July 25th, 1866, and of all amendments thereto. The purpose of this Corporation being to make such portions of the Railroad and Telegraph line of said "Oregon Central Railroad Company," which is now completed, a part of the line of Railroad and Telegraph which this Corporation proposes to construct, as aforesaid, from Portland, Oregon, to the California line, and to construct and equip the whole line thereof, from Portland

in Oregon to said California line, in all respects in accordance with the Act of Congress hereinbefore referred to, and the amendments thereto, and for the purpose of receiving all the benefits of such Act of Congress and amendments thereto intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of such Act.

And these Defendants aver that hereafter when the Defendant the said Oregon Central Railroad is mentioned it shall be designated, as in said Amended Bill, "O. C." and the Defendant the Oregon and California Railroad Company will in like manner be designated "O. and C."

And these Defendants, further answering said Amended Bill, deny that under or by virtue of said Act of Congress of the 25th of July, 1866, and the acts amendatory thereof, 256,000 acres of land per mile were granted to such Corporation, as might be selected or designated by the Legislature of Oregon, to aid such selected Company in the construction and equipment of a Railroad and Telegraph Line from the Central Pacific Railroad in California, or otherwise, or any other or greater number of acres than hereinafter stated. And these Defendants aver that the grant of lands so made by said Act was only of every alternate Section of the public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, (ten on each side) of said Railroad line, and the right when any of said alternate sections, or parts of sections, should be found to have been granted, sold, reserved, occupied by home-

stead settlers, preempted or otherwise disposed of to select in lieu thereof, under the direction of the Secretary of the Interior, in alternate Sections designated by odd numbers nearest to and not more than ten miles beyond the limits of said first named alternate sections. And these Defendants aver that the total number of acres of public lands, designated by odd Sections, within said twenty mile limits, and granted by said Act, was only 56,850 11-100 acres for the first twenty miles, and will not exceed 1,495,780 acres for the first two hundred miles of said road.

And these Defendants admit that the Legislature of the State of Oregon did by joint Resolution, on or about the 20th day of October, 1868, designate said Defendant O. C. as the Corporation to take the benefits of said Act of Congress and that said designation was after the incorporation of said O. C., and after the pretended organization of said O. C., but these Defendants deny that said O. C. was, at the date of said designation, or ever, duly organized.

And these Defendants aver that at the time of said pretended organization of said O. C. one half of the Capital Stock of said Company had not been subscribed and said pretended organization was and is illegal and void.

And these Defendants admit that the Commissioners under said Act of Congress of July 25th, 1866, examined said twenty miles of said road and made their report in substance as in the VI Article of said Amended Bill alleged, but Defendants deny that

thereby and by virtue of said Act of Congress, or otherwise, the said O. C. became or was on said last mentioned day, or ever, entitled to, Four Hundred Sections or 256,000 acres of land, or any greater number of acres of land than 56,850 11|100 acres; and Defendants deny that said land was of the value of Six Hundred and Fifty Thousand Dollars, or of any other or greater value than \$8,527.50; and Defendants allege that within the limits of said grant, as fixed by said Act of Congress, for the said Twenty miles of said Road, there were only 56,850 11|100 acres of land subject to said grant, and said lands were not worth, at the time of completion of said twenty miles of Road, viz: December 25th, 1869, and never since have been worth, to exceed Fifteen cents per acre.

And these Defendants deny that the Defendant the Oregon Central Railroad Company and A. J. Cook, on the 23rd day of April, 1869, or at any other time, entered into a contract, written or otherwise, for the construction and equipment of its Railroad from Portland Southerly a distance of One Hundred and Fifty miles, or any other distance, upon the line of the route so surveyed and adopted by said O. C., or otherwise, for the agreed compensation of \$5,250,000 00|100, or for any other consideration; and they deny that said O. C. immediately after the making and signing of said contract, or ever, delivered the same to said Albert J. Cook; and deny that thereafter, on the 2nd day of May, 1867, or at any other time, said Albert J. Cook transferred and delivered any right, title or in-

terest therein to Plaintiff Elliott. They deny that said Cook transferred along therewith, or otherwise, Two Million or any other amount of the preferred stock of said O. C.; deny that said Stock had been by said O. C. paid or delivered to said Albert J. Cook, on the 23rd day of April, 1867, or ever, in pursuance of said Contract and agreement, or otherwise.

These defendants admit that on or about the 20th day of March 1868 the Complainant Elliott attempted and pretended to assign seven-twentieths of said pretended Contract, but they deny that he reserved to himself all or any of said last named stock, or made any reservation thereof whatever.

And these Defendants aver that about said April 23rd 1867 the Complainant Simon G. Elliott falsely represented to the Defendant The Oregon Central Railroad Company, its officers and agents, that he (said Elliott), was the attorney in fact of one A. J. Cook, whom he, the said plaintiff S. G. Elliott, falsely and fraudulently, and with intent to deceive and defraud the Defendant The Oregon Central Railroad Company, represented to be a Railroad Contractor and Builder of large means, and a man that could control large capital, and that he could carry out to successful completion the work of constructing and equipping a Railroad of One Hundred and fifty miles in length, from Portland, Oregon, Southerly, through the State of Oregon; and said Oregon Central Railroad Company, its officers and agents, relying on the said statements and representations of Complainant

(all of which were false and fraudulent, in this, that said Complainant Elliott had no authority whatever to act for, or in the name of, any such Railroad Contractor of that name, or of any person of that name of wealth, or who controlled any capital whatever, or of any person; said A. J. Cook being a myth, or some obscure, worthless individual of neither means, reputation or influence, selected by the said Elliott for the sole purpose of aiding him, the said Complainant S. G. Elliott, in perpetrating the fraud herein stated, such name, A. J. Cook, being selected by Plaintiff by reason of the similarity of the said name to that of Jay Cooke, the celebrated capitalist and Banker of New York, Philadelphia, Washington, and other Eastern cities, thereby representing and intending to represent to the said Oregon Central Railroad Company, and to the people of Oregon, interested in the enterprise for which it was incorporated, that it was in fact said Jay Cook), did, as party of the first part, by its Board of Directors and officers chosen at said pretended organization of said Corporation so far as it legally could or might, enter into an agreement in writing with Complainant S. G. Elliott, under the name of Albert J. Cook, as party of the second part, in substance and effect for the building and equipping, by said party of the second part, of One hundred and fifty miles of said Railroad of said O. C., with all necessary rolling stock, fixtures, stations, machinery, &c., from Portland South through the Willamette Valley, in manner in said Contract specified, for the agreed

compensation to be paid by the said O. C. of \$5,250,000, to be paid in the Company's (said O. C.) first Mortgage Railroad Bonds, payable in twenty years from date of the same, with interest at seven per cent. per annum, at their par value, and if the interest was not paid during the construction of the road, bonds of the Company to be received in lieu of interest. And it was further agreed in and by said Contract, and as part thereof, that the said O. C. should issue Two Millions of preferred Stock of said O. C., bearing interest at seven per cent. per annum, and deliver the same to said party of the second part immediately after signing of said Contract. And these Defendants aver that said Contract is the same Contract referred to in the VII Article of said Amended Bill, all of which will more fully appear by reference to said Contract, a full copy of which is herewith filed, marked "Exhibit A," and made part thereof.

That said agreement was procured to be executed by the fraud of Complainant S. G. Elliott as aforesaid. That in so far as the same provided for the issue of preferred interest-bearing non-assessable stock, said Oregon Central Railroad Company exceeded its powers; and said Oregon Central Railroad Company, still relying on the representations of said Plaintiff as aforesaid, and in pursuance of such written agreement, did issue and deliver to said Complainant S. G. Elliott, but in the name of A. J. Cook, and without the same ever having been subscribed for, Two Millions of Dollars of what, on its face was denominated non-

assessable preferred interest-bearing stock, a blank form of the Certificate of which stock is herewith filed, marked "Exhibit B," and made a part of this Answer. That all said Two Million Dollars of stock was procured to be issued by the fraud of the Plaintiff as aforesaid, and without any consideration being paid therefor by said Plaintiff, or A. J. Cook, or any one else, and in the issue and deliveray thereof said Defendant, the Oregon Central Railroad Company, its officers and agents, exceeded their powers, and the said issue and delivery thereof was ultra vires and void.

And these Defendants, further answering said Amended Bill, admit that after the last aforesaid Contract was entered into as aforesaid, the said O. C., (so far as it legally might do so under its aforesaid pretended organization), and A. J. Cooke & Co., on or about the 12th day of May, 1868, made and entered into another agreement to build and equip two hundred and ten miles more of the Railroad aforesaid, from the point of the termination of the first one hundred and fifty miles, southerly to the state line, but these Defendants aver that they have no knowledge or information sufficient to form a belief as to whether said last agreement was assigned from said A. J. Cook & Co. to Plaintiff Elliott or by Complainant Elliott to said firm of Ben Holladay & Co., and therefore deny each of said allegations. That a copy of said Contract is herewith filed, marked "Exhibit C", and prayed to be made part hereof.

And these Defendants aver that in order to induce said O. C. to enter into said last mentioned Contract said Complainant Simon G. Elliott, falsely represented to said O. C., its acting Board of Directors, officers and agents, that Albert J. Cook & Co. was a co-partnership of sufficient means and able to control capital sufficient to construct and equip the whole line of Railroad of said O. C. running through the State of Oregon; that said A. J. Cook was a wealthy railroad contractor, and that James P. Flint and the firm of Flint, Peabody & Co., wealthy men, were members of said firm, and said O. C. & its officers relying upon said representations, entered into said Contract (so far as they might legally do so); and these Defendants aver that all said representations were and are false and fraudulent, and said agreement was obtained by fraud and was and is void.

And these Defendants, further answering, deny that on the said 7th day of September, 1869, said E. N. Cook, George L. Woods, J. H. Moores, John F. Miller, Jacob Conser, J. H. Douthitt, A. L. Lovejoy, I. R. Moores, J. H. Foster, J. C. Hawthorne, George Weidler, A. Bush and one George E. Cole, did not own and did not profess to own any other or greater number of shares of the capital stock of said O. C. than is set opposite their names respectively in said Amended Bill, and they deny that they did not own and did not profess to own but one share each of the stock of said Company. And these Defendants aver the fact to be that each of said persons, on September

7th, 1869, and at the time of said alleged transfer of said 39,930 shares of stock to Ben Holladay, and at the time of the passage of the Resolution referred to in the Amended Bill herein, held in their own right and bona fida the following shares of stock in said Oregon Central Railroad Company:

E. N. Cook	248 shares
Geo. L. Woods	168 shares
I. R. Moores	118 shares
John F. Miller	1 share
Jacob Conser	588 shares
J. H. Douthitt	588 shares
A. L. Lovejoy	588 shares
J. H. Moores	268 shares
J. H. Foster	1 share
J. C. Hawthorne	1 share
Geo. W. Weidler	1 share
A. Bush	1 share

And these Defendants deny that said persons, or any of them, had no interest in said stock, and deny that said persons, or **either of them, held the same** for the sole use or benefit of Benjamin Holladay, or to enable them to act as Directors of said O. C., and deny that said persons, or either of them, held said stock, or any portion thereof, for the use or benefit of Benjamin Holladay, or any other person or persons except themselves.

These Defendants deny that said Board of Directors of the said O. C. were at the date of said meeting, to wit: September 7th, 1869, or at the time of the

passage of said resolution, or ever, acting under the direction or as the tools or confederates of said Ben Holladay in said Amended Complaint called Benjamin Holladay.

These Defendants admit that the Certificate for said pretended Stock was made out in the name of Ben Holladay, but these Defendants aver that it was the intention at the said time both of the firm of Ben Holladay & Co. and the Directors of the the said O. C., that said 39,930 shares of stock should be issued to Ben Holladay & Co., but through some inadvertence or mistake of the Secretary of said Company, or other parties, said stock was directed to be issued to Ben Holladay and the certificate made out in his name, and that upon the discovery of the mistake said Ben Holladay immediately transferred the same to Ben Holladay & Co., and had the same so transferred upon the books of the company. And these Defendants allege that said Resolution was passed, and shares attempted to be issued, and said certificate made out, without fraud and in good faith and at the request and with the consent of Complainant Elliott, and with the sole object of endeavoring to strengthen the credit of said Ben Holladay & Co., and of securing public confidence and credit for the bonds of said Railroad Company held by said Ben Holladay & Co. And these Defendants deny that said stock was issued or delivered without any consideration of any sort moving from said Holladay, or any other person or corporation, therefor, or paid to or received by

said O. C., and deny that the same was issued or delivered with the intent to enable said Holladay to carry into effect the fraudulent schemes and contrivances in said Amended Bill set forth, or any schemes and contrivances, fraudulent or otherwise. And these Defendants, aver that as a consideration for issuing of said certificate and said attempted transfer of Stock to said Ben Holladay & Co., said Ben Holladay & Co. agreed and assumed to pay, and did pay, the indebtedness of said O. C., amounting to about the sum of Dollars, U. S. Coin, excepting the indebtedness arising under the contracts of construction then held by Ben Holladay & Co. as herein more fully stated, in addition to the liabilities assumed by said Ben Holladay & Co., as stockholders of said O. C., if any interest or title to said stock passed by said proceeding.

And these defendants, further answering, deny that, on or prior to the 17th day of December, 1869, the said Ben Holladay had, by a series of, or any, devices or contrivances, unknown to Plaintiffs, or otherwise, become possessed of, or that there was standing in his name and in the names of others of his confederates the then acting officers of said O. C., or otherwise, all the shares of the Capital stock of said O. C. issued or procured to be issued by it, except the number of shares particularly enumerated and specified in "Schedule F," annexed to said Amended Bill; and these Defendants deny that said Holladay had any confederates, and deny that the

then acting officers of said O. C., or any officers of the said O. C., were the confederates of said Holloday; and these Defendants deny that the shares of stock of said O. C. mentioned in "Exhibit F" of said Amended Bill, or any portion thereof, were then, to-wit: on said 7th day of September, 1869, or at any other time, owned by the several persons mentioned in said "Schedule F", and deny that each of said persons owned the number of shares set opposite their names in said "Schedule F", or any number of shares whatever. And these Defendants aver that all said Stock specified in said "Schedule F" of Complaint is a part of the Two Billion Dollars of non-assessable preferred interest-bearing stock, wrongfully and fraudulently, and without any legal authority or consideration, issued by the O. C. as hereinbefore stated, and all said persons named in said "Schedule F" took the same with full knowledge that the same were illegally and fraudulently obtained by said Elliott, and that they were issued without any authority by said O. C., and said persons named in said "Schedule F" took the same without any consideration whatever, knowing the same to be illegal and void.

And these Defendants, further answering, deny that Complainants have requested, or ever did request, said O. C., or its Board of Directors as it existed at the date of the indenture of conveyance by the said O. C. to the Oregon and California Railroad Company, in said Amended Bill referred to or otherwise, to institute or prosecute this action, or any

similar action, or any action, in the name of said O. C as Plaintiff against the Oregon and California Railroad Company, this Defendant, or otherwise, to obtain the judgment or relief in said Amended Bill sought or prayed for, or otherwise, for the benefit of the stockholders of said O. C. or otherwise, and deny that said O. C., or its Directors or officers, acting under the advice or at the instigation of said Holladay, C. Temple Emmett, The Oregon and California Railroad Company, or their confederates, or all or any of them, or otherwise, have hitherto, or ever, or do still refuse to institute or prosecute any suit for the relief sought or prayed for by the Amended Bill in this suit, or otherwise; and these Defendants deny that said Complainants, or either of them, have ever requested said Defendant the O. C., its Directors or officers, to institute any suit, action or proceeding, or that said O. C., its Directors or officers, have ever refused to institute or prosecute any suit, action or proceeding, for the benefit of Complainants or the stockholders of said O. C., and deny that said O. C., its directors or officers, have ever acted under the advice or instigation of Ben Holladay, C. Temple Emmett, The Oregon and California Railroad or their confederates.

And these Defendants, further answering said Amended Bill, deny that there are any stockholders in the Oregon Central Railroad Company; deny that Complainants have any right or authority to, or do, bring this action on behalf of any such stockholders;

but these Defendants aver that on the 28th day of March, 1870, at a meeting of the stockholders of the said O. C., duly called for such purpose, and legally held at the office of their Company in Salem, Oregon, the stockholders of said O. C. did, by over a two-thirds vote of the Capital Stock of such corporation, authorize the dissolution of such Corporation, the said O. C., and the settling of its business, the disposing of its property, and the division of its Capital Stock; and in pursuance of such authority, such Corporation was dissolved, all its property disposed of, and the whole proceeds thereof were required to cancel the indebtedness of the said O. C., and such proceeds were applied to such purpose, leaving no surplus to divide among its stockholders, whereupon the stock in such corporation, including all stock in such Corporation, including all that specified in "Schedule F", and a part of which is now claimed by Plaintiff, was then declared cancelled, and ordered by a two-thirds vote of the stockholders of said O. C., and by the Board of Directors thereof, to be surrendered up for cancellation.

And these Defendants, further answering, deny that said Holladay, combining or confederating with the Directors of said O. C. Defendant herein, or falsely pretending to have the control of the contracts and agreements aforesaid, between said O. C. and said A. J. Cook and said A. J. Cook & Co., on or about the 7th day of September, 1869, or at any other time, surrendered nominally the said contracts and agree-

ments to said O. C. and cancelled or attempted to cancel the same, or that the same were surrendered or cancelled, except as hereinafter stated.

These defendants deny that said Holladay and C. Temple Emmett, on the said 7th day of September, 1869, or at any other time, by the aid or countenance of their confederates, the aforesaid Directors of said O. C., or otherwise, nominally, or in any manner, except as hereinafter fully stated, nominally, or otherwise, surrendered to said O. C., or nominally, or otherwise, cancelled, with the consent of said O. C., against the consent or will, or without the knowledge, of said Plaintiff Elliott, or the Assignors of Plaintiff, Nightingale, or otherwise, all, or any, of the shares of the Capital Stock of said O. C., except the shares enumerated in said "Schedule F."

And these Defendants deny that Complaint Elliott has any shares of the stock of said O. C.; deny that any shares of said O. C. were outstanding; and deny that said Holladay illegally or fraudulently or with intent to cheat or defraud Plaintiff Elliott, or any other person, or otherwise, assumed, pretended, or attempted, to surrender or cancel any stock of said O. C. which he had obtained possession of from said Plaintiff Elliott, or otherwise; deny that said Directors of the O. C. each held but one share of stock; but Defendants aver that they held the number of shares hereinbefore stated to have been held by them upon said 7th day of September 1869; and Defendants aver that there is not, in fact, outstanding any shares of

said Capital Stock of said O. C., but that the whole of said Stock was duly and legally cancelled, and said Contracts were duly and legally surrendered and cancelled, as hereinbefore more fully stated.

And these Defendants, further answering, aver that after the execution of said Contract, marked "Exhibit A," and prior to September 12th, 1868, to wit: on or about November 27th, 1867, said Complainant S. G. Elliott further falsely represented to said O. C., its officers and agents, that said A. J. Cook, so called, had associated with him divers persons of wealth and influence, under a co-partnership named A. J. Cook & Co.; that such association or firm had sufficient means, and could control sufficient capital, to construct and equip the whole line of said Railroad of said Oregon Central Railroad Company, running through the State of Oregon, and said Plaintiff falsely claimed to be agent for such firm of A. J. Cook & Co., and, as such, represented to said Company (the O. C.) that in order to carry out said first contract it would be necessary to amend the same by a supplemental agreement, and falsely represented that said A. J. Cook & Co. had purchased large amounts of iron and Railroad Material in the East, and said O. C., relying upon his, and Elliott's representations, entered into a supplemental agreement, (so far as they could do so under said pretended organization) with Plaintiff Elliott, in the name of A. J. Cook, to said first agreement, by which said first agreement was materially changed, and in which

agreement, among other things, said O. C. agreed to issue and deliver to Complainant Elliott a large amount of the Bonds of said Company, the O. C., in advance of the work to be done under said first contract, all of which will more fully appear by said agreement, a true copy of which is herewith filed, marked "Exhibit D", and made part hereof.

And these Defendants aver that all said representations, so made by said Plaintiff Elliott, were false and fraudulent and made by said Complainant Elliott for the sole purpose of procuring to be issued to him, said Elliott, a large amount of the Bonds of the said O. C. And these Defendants aver that said O. C., relying upon the aforesaid statements of Complainant Elliott, that said A. J. Cook and said A. J. Cook & Co. had purchased large amounts of Railroad material in the East, to be used in the construction of its said Railroad under said original contract, did issue and deliver to the said Plaintiff, in advance of the work upon said road, Bonds of said Company to the amount of \$775,000.

And these Defendants, further answering, aver that said Complainant S. G. Elliott and said firm of A. J. Cook & Co. after having obtained said Contract as aforesaid and the Stocks and Bonds issued thereunder as aforesaid, and after having partially graded the first twenty miles of said Railroad, failed to proceed with the work on said Contracts, or any of them, and wholly abandoned said enterprise and represented to said O. C. that they were unable to proceed with the

same and that they were unable to procure the necessary funds to carry on said work, and on or about the 12th of September, 1868, Complainant S. G. Elliott and said firm of A. J. Cook & Co. assigned and transferred to Ben Holladay & Co. all their interest in said Contracts, Bonds, Stocks, &c., as hereinafter more fully stated, and wholly abandoned said enterprise. That the firm of Ben Holladay & Co. was composed of Ben Holladay, C. Temple Emmett and Plaintiff S. G. Elliott. That prior to such transfer, and as an inducement thereto, and as an inducement to the formation of the co-partnership between Plaintiff S. G. Elliott and said Holladay and Emmett, said Elliott falsely represented to said Holladay and Emmett that he, Complainant Elliott, was a civil engineer and an experienced Railroad builder and competent and qualified to superintend the construction of a Railroad, and that said Elliott had the control and ownership of all the said Contracts, Bonds, Stocks, &c., provided for in said Contracts and hereinbefore referred to, and that he could transfer and surrender the whole thereof to the firm of Ben Holladay & Co.; and said Elliott and said Holladay and Emmett, said Elliott in order to induce the said Holladay and Emmett to enter into Articles of Co-partnership, and to induce a purchase by such firm of such Contracts and interests, falsely and fraudulently represent to said Holladay and Emmett (the said Holladay and Emmett having no means of knowing, except as they relied upon the representations of Plaintiff), that the work of

construction on said Railroad was so far advanced from Portland, Oregon, to Salem, in Oregon, that the same, for such distance, could be completed ready for the ties and rails, for an additional cost and expense of \$40,000, and that he, said Elliott, as superintendent of Construction thereof, could complete the same for such sum for said distance; and did further falsely represent that a large amount of money had been expended before that time in the grading of said Road, more than had actually been expended, and that there was machinery enough owned by said A. J. Cook & Co. to complete and put in operation the said road to Salem, and that the indebtedness of said A. J. Cook & Co. was much smaller than it actually was; and these Defendants aver that each and all said representations were false and fraudulent and made with the intention on the part of said Elliott to deceive and defraud, and did deceive and defraud, the said road to Salem, and that the indebtedness of enter into such copartnership and purchase such Contracts and interest aforesaid; and by reason of all such false and fraudulent representations upon the part of said Elliott, the said Holladay and Emmett were induced to enter into copartnership with Plaintiff Elliott for the purpose of constructing said Railroad of said O. C. under the said several contracts between said O. C. and said Complainant Elliott, under the name of A. J. Cook and A. J. Cook & Co., copies of which Articles of Co-partnership are herewith filed, marked "Exhibit E", and made part hereof. And

said Holladay and Emmett, believing at the time that the Plaintiff S. G. Elliott had full power and authority, as he represented he did have, to make sale and transfer of all said contracts, and believing as they did that said firm of A. J. Cook & Co. were the real owners of all said Bonds of said Oregon Central Railroad Company, to wit: the sum of \$775,000 thereof, issued and delivered to said Elliott under said supplemental agreement as aforesaid, except the sum of about \$38,000 thereof, known to have been negotiated and sold, agreed with said Complainant Elliott, as the representative and agent of A. J. Cook & Co., for the purchase of said Contract, by said firm of Ben Holladay & Co., and all the said Bonds and Stocks, property and interests of said firm of A. J. Cook & Co., and on or about said 12th day of September 1868, procured an assignment of all the right, title and interest of said firm of A. J. Cook & Co., and of said Plaintiff Elliott in and to said contracts, bonds and stocks; but these Defendants aver the fact to be that, prior to said 12th day of September 1868, said Plaintiff had assigned an undivided two-twentieths of said Contracts, or the profits thereof, to one James P. Flint, an undivided seven-twentieths thereof to one N. P. Perrine, an undivided two-twentieths thereof to Gardner Elliott, an undivided two-twentieths thereof to T. R. Brooks, and an undivided seven-twentieths thereof to one Ignatz Frohman and the said S. G. Elliott, on said 12th day of September, 1868, and at the time of the formation of said copartnership of

Ben Holladay & Co., in his own right, either as a member of the firm of A. J. Cook & Co., or otherwise, did not own any portion of said Contracts or either of them, but the interest of said Perrine was purchased by said Ben Holladay and put into said firm, the interest of said Frohman was purchased by moneys of Ben Holladay & Co. and put into said firm of Ben Holladay, and the interest of said Brooks and Gardner Elliott by giving them some interest in the new firm of Ben Holladay & Co.

And these Defendants aver the fact to be that said A. J. Cook & Co. were not, at the date of such Articles of Co-partnership, or at the date of the transfer of said Contracts, Bonds, &c., the owners of all such Bonds, as represented to said Holladay and Emmett by Complainant S. G. Elliott; but Complainant Elliott had, prior to such date, sold or disposed of a large amount of such bonds to divers persons, the exact amount of which these Defendants cannot now tell, which fact, in relation to the disposition of such large amount of Bonds, said Elliott studiously concealed from said Holladay and Emmett at the time of entering into such copartnership, and said Plaintiff Elliott wholly failed to deliver said large amount of such bonds to the firm of Ben Holladay & Co.

That said firm of Ben Holladay & Co. were compelled, in order to prepare the first twenty miles of said Railroad bed, ready for the ties, lying immediately south of Portland, to expend, and did actually expend, over one hundred thousand dollars, in coin,

all under the management of the Plaintiff S. G. Elliott as Superintendent of Construction, and expended over \$227,726.18, in coin, in preparing the balance of the road between Portland and Salem, ready for the ties.

And these Defendants further aver that it was agreed in and by said Articles of Co-partnership of Ben Holladay & Co., that said Plaintiff S. G. Elliott should be General Superintendent of Construction of said Road, at a salary of Five Hundred Dollars per month, to be paid by said Ben Holladay & Co., and that, in pursuance of such Articles of Co-partnership, the Plaintiff Elliott took charge of said Road as General Superintendent. That he was and is wholly incompetent and unfit for such position of General Superintendent of the construction of said Railroad, or any Railroad. That he is not a civil engineer and has no theoretical or practical knowledge of such business; that he does not have any theoretical or practical knowledge of the business of railroad building, and all his representations to said Holladay and Emmett, in that regard, were fraudulent, and said co-partnership agreement was procured by fraud and was and is fraudulent and void.

And these Defendants aver that, under the Acts of Congress, referred to in the Complaint, making a grant of lands in aid of said Railroad, **twenty miles** of such Railroad and Telegraph line were required to be completed on or before December 25th, 1869, yet the Plaintiff S. G. Elliott, as General Superintend-

ent of the work of construction on such twenty miles, and with the intention of injuring and defrauding said Holladay and Emmett who were furnishing all the means to carry on such work, did, during the months of July and August and September of said year 1869, studiously manage and conduct the work, on such twenty miles, in such manner so as to prevent, if possible, the completion of the said twenty miles within the time prescribed in the Acts of Congress aforesaid; and said Plaintiff Elliott did, further, during such months, say to his confidential friends that such was his intent and that he intended to prevent said firm of Ben Holladay & Co. from completing the same within the time, in order that the Contracts for the construction of such road might pass into other and different hands, with a view upon the part of Complainant Elliott of obtaining a larger interest in such contracts than he held as a member of the firm of Ben Holladay & Co., and to such end said Plaintiff Elliott did, wrongfully and fraudulently, in the month of September, 1869, discharge a lot of men engaged in work as graders on such twenty miles; and did in divers other ways grossly violate the letter and spirit of said articles of copartnership; and by reason of all which conduct on the part of Plaintiff, as one of the partners in the firm of Ben Holladay & Co., said Ben Holladay and C. Temple Emmett and such firm were greatly injured; and said Holladay and Emmett, on account of the gross incompetency of Plaintiff Elliott, his

wilful misconduct in retarding such work as aforesaid, and of his other fraudulent practices as herein stated, did, in the name of Ben Holladay & Co., on or about the 4th day of October, A. D. 1869, discharge said Elliott from said position of General Superintendent of Construction, and did appoint in his stead J. F. Kidder, an experienced and practical Railroad builder and engineer; and these Defendants aver that said articles of copartnership were procured to be executed by the gross fraud of Complainant Elliott, and the agreements and conditions therein were grossly and wilfully violated by him; and these Defendants aver that if said Plaintiff Elliott had not been discharged, and had been permitted to remain in said position of General Superintendent, said first twenty miles of Railroad would not have been completed within the time prescribed by said Acts of Congress.

And these Defendants further aver that, subsequent to the date of the formation of such copartnership (September 12th 1868) and prior to March 28th, 1870, the said Holladay and Emmett (the principal amount being paid by Defendant Holladay), for and on behalf of said firm of Ben Holladay & Co., paid out and advanced, in and about the business of said firm, and with the consent and assent of the Complainant Elliott, in building said Railroad and in advancing the interests of said firm, paying expenses of litigation as to the corporate rights of said O. C., in procuring necessary legislation in relation to the fran-

chise whereby the said firm of Ben Holladay & Co. were to be benefitted, and in building and equipping said Railroad (twenty miles of which was then built and a large amount of work additional was done) a large amount of money, to wit \$391,000 and over U. S. gold coin; and the said firm had, for a like purpose expended in like manner other large sums borrowed; the whole amounting in the aggregate to about the sum of \$800,000 in gold coin.

That Complainant Elliott furnished no part of such moneys. That about March 1870, by reason of the many complications arising principally from the frauds of Plaintiff S. G. Elliott, as aforesaid, in relation to said Contracts, said A. J. Cook and said A. J. Cook & Co., and by reason of the constant obstacles being thrown in the way of said enterprise, by a rival Company of the same name of the O. C., incorporated at Portland, Oregon, the said firm of Ben Holladay & Co. and the said O. C. Defendants herein, found it impossible to negotiate the securities or bonds of said O. C., the same being so clouded, by reason of the transactions hereinbefore stated, that it was impossible to negotiate the same, or raise money thereon, and the said Defendant, the O. C., was wholly unable to meet, and did fail to meet, the requirements of said Contracts with Complainant S. G. Elliott, made in the name of A. J. Cook and with A. J. Cook & Co., and then held by Ben Holladay & Co., and the object for which said copartnership of Ben Holladay & Co. had been formed, to wit: the construction of said Railroad

of said O. C. under said Contracts, by reason of the fact that said Bonds could not be negotiated, proved, and was, wholly impracticable, and its further prosecution would have proved ruinous to said firm of Ben Holladay & Co., and all said Contracts, Bonds, and Stocks, were not, at said time, or ever, of any value whatever.

Whereupon, in order to save the Defendant O. C. from Bankruptcy, and secure the said firm of Ben Holladay & Co. for work already done under said Contracts, the said Contracts were, by agreement between Defendant the O. C. and Ben Holladay & Co., acting by said Holladay and Emmett, said Elliott having absconded from the State and abandoned said enterprise, upon sufficient consideration, and by mutual consent, duly cancelled and set aside, and all work was suspended thereunder, and all bonds of the O. C., delivered under or in pursuance of all said Contracts, were surrendered up by said Ben Holladay & Co. to said O. C. And all stocks of the O. C. standing on the books of said O. C. in the name of Ben Holladay & Co. were surrendered and delivered up to said O. C. to be cancelled. And said Oregon Central Railroad and Telegraph line, so far as then completed, together with all uncompleted portions of the same, including all rolling stock and other property belonging thereto or connected therewith, was surrendered up and delivered to the possession of the said O. C., and all mills, machine shops, tools, implements, horses, mules, carts, oxen, live

stock, and all property of every name and description, then owned by or standing in the name of Ben Holladay & Co. in Oregon, or in their possession and intended for use in and about the construction of such railroad, was transferred, conveyed, and delivered, to said O. C., by said Ben Holladay & Co., and in consideration thereof said O. C., by resolution of the Board of Directors thereof, assumed and agreed to pay, or cause to be paid, to Ben Holladay & Co., within two years from that date, the full amount, in Gold Coin of the United States, of the moneys expended and the liabilities incurred by said Ben Holladay & Co., including all expenses incurred and money paid in defending the Corporate rights of such corporation and in securing and establishing its franchises, interest to be paid on such amount, from date at the rate of one per cent per month. And said O. C., by Resolution of its Board of Directors, duly and legally passed by the unanimous vote of said Board, at a meeting thereof duly and legally called upon due notice and duly and legally held at the office of said Company at Salem, Oregon, on the 28th day of March, 1870, accepted the surrender and cancellation of said Contracts and cancelled the same, and the surrender of said Bonds, and the surrender of said Stocks, for cancellation, and accepted the said Railroad and Telegraph Line, rolling stock, machine shops, machinery, tools, and all other property so surrendered by said Ben Holladay & Co., and assumed and agreed to pay to said Ben Holladay & Co. all moneys expend-

ed by them under said contracts as aforesaid, and authorized and instructed its President and Secretary to enter into a written contract with said Ben Holladay & Co., on behalf of said Company, embodying the provisions of said Resolutions; all of which will more fully and at large appear by reference to said Resolutions and proceedings, a true copy of which is herewith filed, marked "Exhibit E", and thereupon, said Ben Holladay & Co. duly executed a conveyance of all said Railroad and Telegraph Line, and other property hereinbefore mentioned, to said O. C., and said O. C. under its Corporate seal and under the hands of its President, acting in pursuance and by authority of said Resolutions, and said Ben Holladay & Co., duly made and entered into a contract embodying the provisions of said Resolutions, as hereinbefore stated, all of which will more fully appear by reference to said Conveyance and Agreement, true copies of which are herewith filed, marked respectively "Exhibits 'G' and 'H'," and made part hereof.

And these Defendants, further answering, aver that said firm of Ben Holladay & Co. was then entirely dissolved, and said indebtedness of said O. C. to said Ben Holladay & Co. was afterwards fully paid by said O. C., or by the O. and C., this Defendant, for said O. C., and in consideration of the transfer and conveyance by said O. C. of all its property and franchises to this Defendant, the O. and C., as hereinafter stated.

And these Defendants aver that said Contracts

were legally and rightfully cancelled, and without any fraud, and upon sufficient consideration, and for the reasons hereinbefore stated, and not otherwise; and said Bonds and Stocks were legally and rightfully surrendered and without any fraud and upon sufficient consideration and for the reasons hereinbefore stated, and not otherwise; and said Railroad and Telegraph Line, rolling stock, and other property, were legally and rightfully surrendered and conveyed to said O. C., and without fraud and upon sufficient consideration, and for the reasons hereinbefore stated, and not otherwise.

And these Defendants, further answering said Amended Bill, admit that on or about the 28th day of March, 1870, said O. C., acting by said I. R. Moores, President thereof, and George E. Cole, Secretary thereof, did undertake to, and did, execute and deliver, and did in fact sign and affix the corporate seal of said O. C., and deliver to said Ben Holladay, as President of said O. and C. or to some other officer or member of said O. and C., an Indenture to grant and convey to said O. and C. all and singular the Railroad and Telegraph line of said O. C., together with all and singular the rights and franchises of every description belonging to or vested in said O. C. and all the property, real and personal, of said O. C.

These Defendants admit that the said O. and C., under said Indenture, on or about the 30th day of May, 1870, took possession of all and singular the said roadbed, railway, depots, and other property and

subsidies mentioned by or in said Indenture ; but these Defendants deny that Ben Holladay took possession of all or any part thereof ; and they deny that said property or any portion thereof was, on said day, the property of said O. C. ; and these Defendants admit that from thence it, said O. and C., has assumed to control, possess and manage the same ; and these Defendants aver that from thence the said O. and C. has controlled, possessed, managed and owned the same for its own benefit ; but they deny that said O. and C. has assumed to control, possess or manage the same, or has controlled, possessed or managed the same, for the benefit of said Holladay ; and they deny that said Holladay has assumed to control, possess or manage the same for his own benefit, or otherwise ; and these Defendants deny that Complainant Elliott is a stockholder of said O. C., and deny that there are now, or were at the commencement of this suit, any stockholders of said O. C.

And these Defendants deny that said Ben Holladay, or Ben Holladay and his confederates, procured fraudulently the passage of a Resolution by the Board of Directors of said O. C., authorizing the execution of the indenture aforesaid, and deny that any persons participating in said meeting were confederates of Ben Holladay.

And these Defendants, further answering, deny that at said meeting of the stockholders of the Defendant the O. C., held the 28th day of March, 1870, Ben Holladay & Co., falsely pretended by Ben Holladay, or

otherwise, to be the owner of 64,661 shares of the stock of said O. C., and these defendants deny that at the time of said meeting said J. H. Douthitt, J. H. Moores, I. R. Moores, E. N. Cook, A. L. Lovejoy, and George L. Woods and Jacob Conser each owned but one share of stock of said Defendant O. C., and these Defendants aver that at said time each of said persons held and owned the number of shares of the stock of said O. C. set opposite their respective names, as follows:

J. H. Douthitt	588 shares
J. R. Moores	268 shares
I. R. Moores	118 shares
E. N. Cook	248 shares
A. L. Lovejoy	588 shares
George L. Woods	168 shares
Jacob Conser	588 shares

These defendants, admit that at the date of said meeting, to wit: March 28th, 1870, said Ben Holladay was President of said O. and C. and one of the Board of Directors thereof, and said Hawthorne and Moores were also Directors thereof.

And these Defendants, further answering, deny that the property, rights, franchises and subsidies purporting to have been transferred and conveyed by said Indenture from said O. C. to said O. and C. were on the said 28th day of March, 1870, or at any time, or ever, or still are, of the value of Seven Millions of Dollars, or any other or greater value than \$800,000; and these Defendants deny that the said O. and C. did not

agree to pay, or has not paid, to the said O. C. any money or other valuable thing for said sale and transfer; and these Defendants deny that said O. and C. has not paid any debts or liabilities of said O. C. otherwise than by a delivery of a portion of the Bonds secured by a Mortgage given by said O. and C. to Milton S. Latham and Faxon D. Atherton; and these Defendants aver that said O. and C. paid as consideration for said conveyance and transfer the full sum of Eight Hundred Thousand Dollars, as hereinbefore more fully stated.

And these Defendants, further answering, deny that said O. C. by any machination or contrivances of said Holladay or said Directors, or in any manner except as herein stated, practically ceased to exist on the 1st day of April, 1870; and these Defendants deny that it was the intent or design of said Ben Holladay or his confederates that the same should be swallowed up or absorbed by the said O. and C.

These Defendants deny that the O. and C. was organized or incorporated by said Holladay, C. Temple Emmett, or their confederates, solely, or otherwise, for the consummation of such intent or design, and deny that said Holladay or Emmett had any confederates. These defendants admit that said O. C. ceased to exist at the date of the dissolution thereof, as hereinbefore fully stated.

And these Defendants, further answering, admit that upon the execution of said Conveyance, from said O. C. to said O. and C., its managers and officers

took possession of all the property, franchises, subsidies, rights, privileges, and appurtenances of the said O. C. purporting to have been conveyed to said O. and C., and these Defendants admit that thereafter said O. and C. mortgaged the property, so conveyed to it by said O. C., and proceeded to construct a railroad from the then terminus of said O. C. Railroad, so far as the same was then completed, substantially upon the route selected by said O. C., Southerly towards the State line of California, and has to this date completed about one hundred and eighty miles thereof, as hereinbefore stated, and at the commencement of this suit had completed about —miles of the same, and is now engaged in operating the same.

And these Defendants aver that after the execution of said indenture by the said O. C. to the Defendant, the O. and C., conveying said road and property of said O. C. to the Defendant the O. and C., as hereinbefore stated, the Defendant the O. and C. did, by authority of a Resolution of its Board of Directors duly and legally passed, and on or about the fifteenth day of April, A. D., 1870, duly execute and deliver, under its corporate seal and the hands of its President and Secretary, a certain Deed of Trust, or Indenture of Mortgage, to Faxon D. Atherton and Milton S. Latham, whereby said O. and C. duly granted, bargained, sold, assigned, transferred, set over, enfeoffed, conveyed and confirmed, to said Atherton and Latham, and the survivors of them, or his successors or assigns. All and singular the said Railroad of the

said O. and C. then constructed, or thereafter to be constructed, from a point at the City of Portland, in the State of Oregon, Southerly through the Willamette, Umpqua and Rogue River Valleys to a point on the Southern boundary of the State of Oregon on the California line, together with all its lands, tenements and hereditaments, acquired and appropriated for the purpose of a right of way for a single or double track Railroad, and all the appurtenances thereto belonging, and all its lands acquired and appropriated, and which thereafter should be acquired and appropriated, for Depots, Engine Houses, Machine Shops, Work Shops, Superstructures and Fixtures, and also all and singular the franchises, rights and privileges (except said Congressional Land Grant) then owned, possessed, or acquired, or that should thereafter be owned, possessed or acquired by said O. and C., and all the rails, bridges, ways, piers, depots, engine houses, car-shops, station-houses, warehouses, machine shops, viaducts, superstructures, fixtures, privileges, rights, locomotives, passenger cars, freight cars, other cars, carriages, tools, machinery, and equipment, of said Railroad, and all other property, real and personal, of said O. C., except as hereinafter stated; To have and to hold the same, **in trust**, for the purpose of effectually securing to the respective holders thereof the payment of Eighteen Thousand Four Hundred and Fifty Bonds of said O. and C., before that time duly authorized to be issued by said O. and C. by resolution of its Board of Directors duly passed, Seven Thousand

Four Hundred and Fifty of said bonds, being of the denomination of One Thousand Dollars each, and Six Thousand of said Bonds being of Five Hundred Dollars each, and Five Thousand of said Bonds of the denomination of One Hundred Dollars each, amounting in the aggregate to the sum of \$10,950,000, all payable on the 1st day of April, 1890, with interest from April 1st, 1870, at the rate of seven per cent per annum, payable semi-annually, both principal and interest payable at the Banking House of Messrs. Dabney, Morgan & Co., in the City of New York in the State of New York, with power to sell all said granted and conveyed property in case of default in the payment of principal or interest of said bonds, and, upon request of a majority of said Bondholders, at public auction in the City of New York, or such other place as said Trustees might designate, and to make and deliver to the purchasers good and sufficient title deeds, and the proceeds of such sale to apply to the payment of interest and principal of said Bonds, all of which will more fully appear by reference to said Indenture, which is herewith filed, marked "Exhibit I," and made part hereof. And these Defendants aver that said Deed of Trust is still in full force.

And these Defendants aver that afterwards, and long prior to the commencement of this suit, the greater portion of said \$10,950,000 of Bonds, and long since the whole thereof, were sold, transferred and delivered by said O. and C. to divers persons and firms for a large and valuable consideration, to wit,

about Sixty Cents upon the Dollar upon the face thereof, and at and before the commencement of this suit, more than \$7,000,000 par value of said Bonds were owned by divers persons and firms, many of whom are to Defendants unknown. That among the owners and holders of said Bonds, at the time of the commencement of this suit, as Defendant are informed and believe, were Heinrich Hohenemser, Aaron Neiderhofheim, Julius Schmidt, Adolph Otto, Henry Villard, Michael Benjamin, Carl Staehelin-Bucknor, F. S. Van Neirop and William Koester, or the most of them who are still owners and holders of said Bonds, and hold and own a majority in number and value of said Bonds, all of which are unpaid and still owing from said O. C. and secured by said Mortgage.

And these Defendants further aver that after the execution and delivery of said conveyance of the said O. C. to the said O. and C., and on or about the 15th day of April, 1870, said O. and C., in pursuance of a Resolution of the Board of Directors of the said O. and C., under its corporate seal and the hands of its President and Secretary, duly executed and delivered to said Faxon D. Atherton, Milton S. Latham and one William Norris, an Indenture wherein and whereby said O. and C. duly granted, bargained, sold, assigned, aliened, set over, enfeoffed, conveyed and confirmed to said Faxon D. Atherton, Milton S. Latham and William Norris, all said Lands granted and intended to be granted by said Act of Congress in the said Amended Bill mentioned, and all the right, title,

interest, claim and demand of said O. and C., legal and equitable, present and prospective, absolute or contingent, in or to all lands and franchises granted or intended to be granted by said Act; To have and to hold the same, in trust, to be sold by them and the proceeds to be invested to create a sinking fund for the redemption and payment of said Eighteen Thousand Four Hundred and Fifty Bonds hereinbefore mentioned, all of which will more fully and at large appear by reference to said Indenture, a true copy of which is herewith filed, marked "Exhibti J," and made part hereof.

And these Defendants, further answering, aver that afterwards, and prior to the commencement of this suit, said Atherton, Latham and Norris, in execution of said trust, duly conveyed all said lands to the European and Oregon Land Company, a corporation duly incorporated under the laws of California and having its principal place of business in San Francisco, California. That all said moneys realized from the sale of said Bonds, and all the moneys realized by sale of Lands, have all been expended in and about the construction and operation of said road and payment of interest on said Bonds. And these Defendants aver that said Atherton and Latham received said Mortgage, and said Atherton, Latham and Norris received said Deed, and said European and Oregon Land Company purchased said land and received a conveyance thereof, and said holders of said Bonds purchased the same in good faith for valuable considera-

tions, and neither of said parties had any notice or knowledge of the matters or things charged in said Amended Bill.

And these Defendants, further answering, admit that said C. Temple Emmett and said Mortgagees of the said O. and C., the said Faxon D. Atherton and Milton S. Latham, are not residents of the State of Oregon. And these Defendants aver that said Emmett and said Mortgagees are, and were at the time this suit was commenced, residents and citizens of the State of California, and said William Norris is not a resident of the State of Oregon, but is and was, at the time this suit was commenced, a resident and citizen of the State of California, and that said European and Oregon Land Company is not a resident or citizen of the State of Oregon, but that the same is, and was at the time this suit was commenced, a Corporation incorporated and organized under the laws of the State of California, and that the said Heinrich Hohenemser, Aaron Neiderhofheim, Julius Schmidt, Adolph Otto, Henry Villard, Michael Benjamin, Carl Staehelin-Bucknor, F. S. Van Neirop and Wilhelm Koester, are all residents and citizens of foreign countries, and neither of them are residents or citizens of the State or District of Oregon, and that the other aforesaid Bondholders are all residents and citizens of foreign countries. And these Defendants aver that said C. Temple Emmett, Faxon D. Atherton, Milton S. Latham, William Norris, the said European and Oregon Land Company, and Heinrich Hohen-

emser, Aaron Neiderhofheim, Julius Schmidt, Adolph Otto, Henry Villard, Michael Benjamin, Carl Staehelin-Bucknor, F. S. Van Neirop and Wilhelm Koester, are not, nor is either of them, within the jurisdiction or subject to the jurisdiction of this Honorable Court, and these Defendants aver that each and all said persons and said Corporation are indispensable parties defendant to this suit, without whose presence this Honorable Court, if the facts should otherwise warrant, could not make any decree or grant to said Complainants, or either of them, the relief prayed for in their Amended Bill, or any part thereof.

And these Defendants, further answering, deny that the sale and transfer from the said O. C., Defendant herein, to the said O. and C., the Defendant, was or is null or void as against Complainants, or either of them, or as against each and every stockholder of said O. C. who did not assent thereto, or who has not subsequently ratified or approved the same, or as against any other person, or otherwise, and deny that said sale is, or ever was, illegal or void. And these Defendants deny that there were or are any stockholders of said O. C. who did not approve the same and consent thereto.

And these Defendants, further answering said Amended Bill, deny that said O. and C., at the time of commencing this suit, threatened to sell some or any of the lands granted, as in said Bill set forth, by said Act of Congress, or will dispose of or sell said lands unless enjoined by this Honorable Court; deny that

said Ben Holladay has uniformly and all the time controlled, shaped or determined the policy of said O. and C.; deny that he has absolutely managed the entire business affairs of said O. and C. constructing its road, or running the same, or receiving the money returns therefore; and deny that he is or ever was wasting or destroying any valuable rights, properties, or franchises, which of right belong to the stockholders of the said O. C., or any rights, property or franchises, or is or ever was destroying or appropriating the same to his own individual use or emolument, or otherwise; deny that there are any rights, property or franchise which belong to the stockholders of said O. C.; deny that there are any stockholders of said O. C.

And these Defendants deny that any person or persons are still owners or holders of any stock in the said Oregon Central Railroad Company; and these Defendants aver that any and all paper, or certificates, purporting to be stock, or certificates of stock, of the said Oregon Central Railroad Company, and designated and called non-assessable preferred interest-bearing stock, are illegal and void; that the said Oregon Central Railroad Company had no power or authority whatever, under the laws of Oregon, or its charter, or from any other source, to issue any such stock, and the issue of all such stock was *ultra vires*, and the same was and is void; and the persons holding the same never were and are not now stockholders in such Company; and all such stock was issued without any consideration whatever, and without ever

having been subscribed for, and none of the persons now holding the same have paid any part of said stock, or any consideration for the same whatever, and took the same with full knowledge of the want of power in said Oregon Central Railroad Company to issue the same.

And these Defendants aver, and so the fact is, that all said lands granted by said Act of Congress were, prior to the bringing of this suit, conveyed by said O. and C., this Defendant, to said Milton S. Latham, Faxon D. Atherton and William Norris, in trust, as is hereinbefore more fully stated.

And these Defendants, further answering, deny that an injunction should or ought to be issued, or awarded to Plaintiffs by this Honorable Court, to restrain this Defendant, the O. C., its agents, employees, officers, or servants, from selling or conveying said lands; to restrain this Defendant, the O. and C.; its officers, agents or servants from selling, conveying or transferring its roadbed, railway-track, and its appurtenances, or any other property, rights, or franchises, acquired by or under said conveyance from the O. C. to the O. and C., or that any injunction should issue or be awarded to Plaintiffs for any purpose whatever.

And these Defendants deny that said Complainants, or either of them, prior to the institution of this suit, on or about the 2nd day of May, 1871, or at other times, or ever, applied or caused applications to be made to each of the Defendants, or either of them, or

their agents, by letter or otherwise, requesting them, or each of them, or either of them, to act towards Complainants in an honorable or just way, or otherwise, or to desist from any unreasonable or unjust or other practices mentioned in said Bill, or otherwise.

And these Defendants deny that Defendants, or either of them, combining or confederating with dividers or any persons, or otherwise, unknown to Plaintiff, or otherwise, or with said Holladay, or contriving how to injure or wrong Complainants, or either of them, have absolutely, or at all, refused to comply with any reasonable or other request of Plaintiffs.

And these Defendants deny that the said conveyance from the said O. C. to the said O. and C. ever was or is illegal or invalid or void in every or any respect against the stockholders of said O. C. or either or any of them, or as against Complainants or either of them, or any other person; and Defendants deny that there were any stockholders of said O. C. who were not present or represented and who did not participate in the stockholders' Meeting which authorized said transfer and conveyance.

And these Defendants deny that Complainants, or either of them, are entitled to the relief sought by their Amended Bill, or any part thereof, or any relief whatever, from Defendant;s and these Defendants deny that said conveyance is null or void, or should of right be so declared, held, or treated, by this Honorable Court. And these Defendants aver that said conveyance is valid and binding in law, not only as be-

tween the said O. C. and the said O. and C., but as against Complainants and each of them, and all and every other person and persons whomsoever.

And these Defendants say that, as they are informed and believe, there are not in the possession, or under the control, of each or either of the Defendants, any writings, deeds, books, papers, memoranda, letters, receipts, tickets, vouchers, or papers, having relation to or connection with the matters in Plaintiffs Amended Bill contained, whereby the truth or falsity of the statements therein contained can be made manifest, except as hereinbefore referred to or set forth in answer to said Amended Bill.

And these Defendants deny that any actions or doings in said Bill set forth are contrary to equity or good conscience, or tend to the manifest or other wrong or injury of Plaintiffs in the premises, or otherwise.

And these Defendants deny that Complainants are remediless at or by the strict rules of the common law for any injuries suffered or sustained from Defendants, or cannot have adequate relief save in a Court of Equity.

And these Defendants, specifically answering the Interrogatories of said Complainants Amended Bill, in answer to Interrogatory 1st, say it is a fact that the said O. C. was duly incorporated as a body corporate, by and under and in accordance with the laws of the State of Oregon, at the time charged and averred in the Bill of Complaint; but these Defendants

aver that the same was not duly or legally organized and had no right to the use of its said corporate name for the reasons hereinbefore fully satted.

And for answer to Interrogatory 2nd, of said Amended Bill, these Defendants say the said O. C. did not in fact make the conveyance to the said O. and C., in manner and form as in said Amended Bill charged, and that said conveyance and transfer was made in the manner and by the authority following, viz: That long prior to March 28th, 1870, and at said date, said O. C. was wholly unable to comply with said contracts with said Plaintiff Elliott, under the name of A. J. Cooke, and with A. J. Cooke & Co., then held by said Ben Holladay & Co., and wholly unable to proceed with the enterprise of constructing said road; that said firm of Ben Holladay & Co., after constructing twenty miles of said road, refused to proceed further with the construction thereof; that the Bonds of said O. C. could not be sold for reasons hereinbefore stated; that the organization of said Defendants was being called in question in divers actions and suits, and a judgment upon the question of such organization would have been adverse to said O. C.; that a suit was then pending to restrain the use of the corporate name of said O. C., by a prior incorporation under the laws of the State of Oregon, having the same name, and said Defendant must have been, in such suit, restrained from the use of said name, and for said reasons and others said Defendant was compelled to and did cancel said Con-

tracts for construction, and was compelled to and did abandon said enterprise, dissolve its existence, settle its business, dispose of its property, and distribute its capital stock.

And these Defendants, further answering said Interrogatory, aver that on the 14th day of March, 1870, at a meeting of the Board of Directors of said O. C., duly called and legally held at the office of said Company, in Salem, Oregon, more than a quorum being then present, a meeting of the stockholders of said O. C. was duly called to be held at the office of the Company, in Salem, Oregon, on the 28th day of March, A. D., 1870, at seven o'clock P. M., for the purpose of considering the propriety of and authorizing the dissolution of such corporation, the settling of its business, disposing of its property, and the division of its Capital stock, which meeting of stockholders was so called pursuant to the provisions of Sec. 19 of an Act of the Legislature of the State of Oregon, entitled "An Act providing for private incorporations and the appropriation of private property therefor" Approved October 14th, A. D. 1862, as amended by an Act approved October 24th, A. D. 1866. And it was further provided by resolution of the said Board of Directors adopted at said meeting so held March 14th, 1870, that the Secretary should give notice of such proposed meeting of the stockholders on March 28th, 1870, at seven o'clock P. M., and of the purpose of it, by publication for ten days in the following newspapers, to wit: The Daily Oregonian, and the

Daily Herald, published at Portland, Oregon, and in the Daily Statesman, published at Salem, Oregon, which notice was in all respects given in accordance with law, and the By Laws of said Company, and a copy of which resolution of the Board of Directors, of said O. C., of March 14th, 1870, calling such meeting of the Stockholders, and providing for notice of the same, is herewith filed, marked "Exhibit K", and made a part hereof. That in pursuance of said laws, and of said resolutions, said O. C. by its Secretary caused notice of said proposed meeting of the stockholders of the said O. C., on March 28th, 1870, at 7 o'clock P. M., and of the object and purpose of said meeting as stated in said resolution, to be published in each of said daily newspapers, to wit: The Daily Oregonian and the Daily Herald, published at Portland, Oregon, and the Daily Statesman, published at Salem, Oregon, for the time specified in said resolution a copy of which notice, so published, is herewith filed, marked "Exhibit L" and made a part of this answer.

And these Defendants aver further, that in pursuance of the laws of the State of Oregon, and of a resolution of the Board of Directors of said O. C., duly passed March 14th, 1870, adjourning the meeting of said Board of Directors of said O. C. to March 28th, 1870, at six o'clock P. M., and of the call of the President of said Board, and personal notice given to each of said Directors, the Board of Directors of said O. C. met at the office of said O. C., in Salem, Oregon, on Monday, March 28th, 1870, at six o'clock P. M., at

which meeting, so duly called and legally held, there was duly passed, by an unanimous vote of said Board, Resolutions duly and legally authorizing the dissolution of said O. C., the settling of its business, the disposing of all its property, as afterwards in said conveyance done, to said O. and C., all of which will more fully appear by reference to said proceedings, true copies of all which are herewith filed, marked "Exhibit M" and made a part of this Answer.

And these Defendants further aver that in pursuance of said laws of the State of Oregon, and of said resolutions of the Board of Directors, of March 14th, 1870, and of said notice of such proposed meeting, a meeting of the stockholders of the said Oregon Central Railroad Company was held at the office of said Company, in Salem, Oregon, on Monday, March 28th, 1870, at seven o'clock P. M., at which meeting there were present and voting the owners and holders of all the capital stock of said O. C. ever legally issued or subscribed for, and persons holding and representing on the books of such company over two-thirds of the whole capital stock thereof, to wit: 50,174 shares, representing \$5,017,400. of such Capital stock, and that said amount included the whole amount of the capital stock ever issued legally by such Company, and at such meeting proceedings were had, and resolutions duly adopted, by a vote of all the said stock present, duly and legally authorizing the dissolution of said O. C., the settling of its business, the disposing of its property to the said O. and C., as

hereinafter stated, and the division of its Capital Stock, all of which will more fully appear by reference to said proceedings, a true copy of which is herewith filed, marked "Exhibit N", and made a part of this Answer.

And these Defendants aver that at the date of said Stockholders' Meeting, to wit: March 28th, 1870, all of said Two Millions of Dollars of non-assessable preferred interest bearing stock, so fraudulently procured to be issued without consideration, as aforesaid, and so illegally, and without any power or authority, issued and delivered, as aforesaid, to said Simon G. Elliott, but in the name of A. J. Cook, stood on the Books of said O. C. in the names of the following persons, that is to say:

Ben Holladay & Co. 14,500 shares, representing	\$1,450,000.00
A. J. Cook, 5,400 shares, representing....	540,000.00
N. P. Perrine, 100 shares, representing..	10,000.00
<hr/>	
Total	\$2,000,000.00

And these Defendants aver that in and by said action of the Board of Directors of said O. C., and of the stockholders of said O. C., at their said meeting on March 28th, as aforesaid, and of their further proceedings at a continuation of such meeting on March 29th, 1870, as hereinafter stated, all said \$2,000,000 of what was called non-assessable preferred, interest bearing stock of said O. C., was declared void, and was cancelled.

And these Defendants aver that in pursuance of the authority conferred on the President and Secretary of the said O. C., by virtue of the proceedings of the Board of Directors of March 28th, 1870, hereinbefore referred to and made a part hereof, and of the resolutions of the Board of Directors of the O. and C., authorizing the same, an agreement was, on said March 28th, entered into between the said O. C., and the said O. and C., whereby a sale was made of all the said Railroad, and property, and franchise, of said O. C., to said O. and C, which sale was made for a valuable consideration, and in good faith, and for the reasons set forth in an agreement of sale duly executed under the seals of the said corporations respectively, and a copy whereof is herewith filed, marked "Exhibit O", and made a part hereof, and the execution of the said Agreements were both duly ratified, on said March 28th, 1870, by a resolution of said Board of Directors.

And these Defendants aver that the execution of said agreements hereinbefore referred to, marked respectively as Exhibits "H" and "O", to-wit: the said contract between said O.—C. and Ben Holladay, and the said contract or agreement for a conveyance of all its property by the O. C. to the O. and C., authorized and directed to be made at said meeting of the Directors of the O. C., of March 28th, 1870, were at said Stockholders' meeting, held March 28th, 1870, at seven o'clock P. M., as aforesaid, duly ratified and confirmed, by over a two-thirds vote of the whole cap-

ital stock of said O. C., reference being had to the proceedings of such Stockholders' meeting, made part hereof, will more fully appear.

And these Defendants aver that at said Stockholders' meeting of said O. C., so legally called and duly held March 28th, 1870, at seven o'clock P. M., said Stockholders, by a vote of over two-thirds of the whole capital stock of such corporation, did authorize the dissolution of said corporation O. C., the settling of its business, disposing of its property, and the division of its capital stock, and all of which proceedings were had in good faith, without any collusion or fraud, and according to the best judgment of all the stockholders present and voting at such meeting, a copy of the record of which proceedings is made a part of this Answer as aforesaid.

And these Defendants further aver that at a meeting of the Board of Directors of said O. C., duly held March 29th, 1870, at the office of the said Company, in Salem, Oregon, at four o'clock P. M., it being a continuation of the meeting of said Board called and held March 28th 1870, at six o'clock P. M., the said O. C. was, by resolution duly passed by the unanimous vote of the said Board of Directors, dissolved upon the terms and in the manner prescribed in the aforesaid resolution of the stockholders of said Company, authorizing such dissolution. And the President and Secretary of said O. C. were, by resolutions, duly authorized and directed to dispose of the property of such Company, and settle its business, and dis-

pose of its capital stock, in the manner provided for in and by said resolutions of the stockholders, and all the proceedings of such stockholders, had and done at said meeting, March 28th, 1870, were by said Board of Directors endorsed, ratified and confirmed, and the President and Secretary of said O. C. were, by said resolutions, duly directed to execute all the suggestions and directons of such stockholders' meeting, in the name of the said O. C., and the said I. R. Moores, President, and George E. Cole, Secretary, of said O. C., were duly authorized and directed to make, execute and deliver to the said Defendant O. and C., of Portland, Oregon, in the name of said O. C., and under its corporate seal, and under their signatures as such President and Secretary, a good and sufficient deed of conveyance of all the property and franchises of the said O. C., of whatever name and nature, real, personal and mixed, and of all its rights, credits and interests whatsoever, in accordance with the said contract entered into with such Corporation for such sale, assignment, transfer and conveyance, and in accordance with the said resolution of the stockholders of the said O. C., adopted 28th day of March, 1870, affirming such sale and directing such conveyance, and the said President and Secretary of said O. C. were further instructed to communicate to the Secretary of the Interior the fact that said O. C. had sold, assigned and transferred and conveyed to the said Oregon and California Railroad Company all its rights, title, interest, in and to the lands, fran-

chises and benefits granted to the Oregon Company by the Act of Congress of July 25th, 1866, and amendments thereto, "granting lands to aid in the construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland, in Oregon," all of which will more fully appear by reference to said proceedings, a true copy of which is herewith filed, marked "Exhibit P," and made a part hereof. And all said resolutions and proceedings of said Board of Directors were had in good faith, and were free from collusion and fraud, and in accordance with the best judgment of all said Directors present and voting.

And these Defendants, further answering, aver that in pursuance of the authority granted by the said stockholders and Directors of said O. C., at their said meetings held on March 28th and 29th, 1870, as aforesaid, the said O. C. did, by and through said I. R. Moores its President and George E. Cole its Secretary, and under its Corporate Seal, on the 29th day of March, A. D., 1870, make, execute and deliver to said O. C. a good and sufficient deed of conveyance of all its property and franchises, as will more fully appear by reference to said deed, a true copy of which, marked "Exhibit Q" is herewith filed and made a part of this answer. And in pursuance of such deed of conveyance, said Defendant O. C. delivered into the possession of said O. and C. all the property in said deed mentioned and described and the said O. and C. Defendant took possession thereof and at once proceeded

with the construction of the said Railroad and Telegraph Line so commenced by said O. C. as aforesaid, and said O. and C. has, since that date, completed and equipped about one hundred and eighty miles of said Railroad and Telegraph Line, and have expended in so doing about the sum of \$5,000,000 00|100 in gold coin of the United States, and one hundred and twenty miles of said road has been duly accepted by the United States. That said transfer and conveyance of the franchises, granted by said Acts of Congress, were recognized by the Department of the Secretary of the Interior, and said Oregon and California Railroad Company have completed such portions of said road in strict accordance with said Acts of Congress, and under the direction of the Secretary of the Interior.

And these Defendants further aver that all the capital stock of said O. C., which Plaintiffs claim falsely to hold and own, is a part of the two thousand shares of stock known as *non-assessable preferred interest-bearing stock*, so illegally and wrongfully and fraudulently procured to be issued in the name of said A. J. Cook, as aforesaid, and which was, on said 28th day of March, 1870, by said O. C. cancelled and declared void, and the certificates of which were directed to be surrendered up for cancellation. That the Complainant John Nightingale, or his assignor, or assignors, never paid any consideration or value for such stock or any part thereof. That he and they accepted the same with full notice and knowledge of all the facts herein stated relating to the unlawful, fraud-

ulent and illegal manner by which the said stock was procured to be issued, and by which the same was issued, and with full notice and knowledge that all said stock was obtained to be issued by fraud, without any consideration, and that said O. C. had no power or authority to issue the same, and he, the said Plaintiff Elliott has procured him, said Nightingale, to join in this suit for the use and benefit of said S. G. Elliott and his confederates, by collusion with him and them and without having any interest whatever in any of the said 3,700 shares of stock, or any stock, of the said Oregon Central Railroad Company.

And these Defendants aver that ALL the stockholders in said O. C., including those persons alleged by Plaintiffs to be stockholders, named in "Schedule F," of Complaint, had legal notice of the said Stockholders' meeting of said O. C., held March 28th, 1870, and of the object of such meeting, and none of said persons make any objection to any of the proceedings then had, and have from thence, up to or until shortly prior to the commencement of this suit, acquiesced in and assented to all such proceedings of said Stockholders and Board of Directors; and they and each of them, and their assignor or assignors are bound thereby.

And these Defendants, further answering, aver that in pursuance of the recess taken by said meeting of the Stockholders of said O. C., so duly called and held March 28th, 1870, the said stockholders convened again on March 29th, 1870, at three o'clock P. M., all said stockholders being present who were present at said meet-

ing on March 28th, 1870. Whereupon, proceedings were had by such meeting of the stockholders, whereby the minutes of the meeting of said stockholders, of March 28th, 1870, were made up, as appears by said "Exhibit M," and were unanimously approved, a copy of which resolution approving the same is herewith filed, marked "Exhibit R," and made a part of this Answer.

And these Defendants aver that in pursuance of the proceedings of said stockholders and Directors of said O. C., so duly had and done March 28th, and 29th, 1870, and of said transfer and conveyance of all said property, rights and franchises of the said O. C. to said O. and C., and the said O. and C. did duly pay and cancel ALL indebtedness of said O. C. to Ben Holladay & Co., and all other persons,—that being the full consideration price agreed to be paid, and which was actually paid, by said O. and C., and by means of all which transactions so had, all the stockholders in said O. C. were released from all liability; and there being no money, property or right remaining to be distributed among such stockholders, or any of them, all said stock was duly cancelled, and said Corporation was duly dissolved as aforesaid.

And, in answer to the 3rd Interrogatory of said Amended Bill, they say and aver that it is not a fact that the vote of the Directors of said O. C., attempting to authorize said conveyance and transfer was dictated or procured to be had by said Benjamin Holladay and C. Temple Emmett, or either of them, and that such Directors were not, in said vote, or ever, the accom-

plices or confederates of said Benjamin Holladay and C. Temple Emmett, or either of them.

And, in answer to the 4th Interrogatory of said Amended Bill, these Defendants say it is a fact that at the meeting of stockholders of said O. C., at which the resolution authorizing said transfer and conveyance passed, said Ben Holladay and C. Temple Emmett, as members of and representing the firm of Ben Holladay & Co., said Elliott having absconded from the state, assumed to vote, and did vote, more than two-thirds of the capital stock of said O. C., and at the same time said Holladay and Emmett were owners and holders of a large majority of the capital stock of the said O. and C., and said Holladay was an officer thereof, but not the said Emmett.

And in answer to the 5th Interrogatory of said Amended Bill, these Defendants say it is not a fact that all the property, rights, privileges, franchises, and appurtenances now, or at the commencement of this suit, under the control, of said O. and C. is the same property, rights, privileges, franchises, or appurtenances, which belonged to the said O. C. at and prior to the said Conveyance by it to the said O. and C., but that all said Railroad of said O. and C., with right of way, depots, shops, warehouses, fixtures, machinery, engines, cars, &c., except the twenty miles completed at the date of said conveyance, and rolling stock then on hand, as hereinbefore stated, has been since said conveyance acquired by said O. and C.

And these Defendants expressly deny all confedera-

tion, connivance, devices, and fraudulent practices, in said Amended Bill charged, without this, that there is any other matter, cause or thing in the said Plaintiffs said Amended Bill of Complaint contained, material or necessary for this Defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied as true to the knowledge or belief of these Defendants; all which matters and things these Defendants are ready and willing to aver, maintain and prove, and this Honorable Court shall direct, and hereby pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

OREGON CENTRAL RAILROAD COMPANY.

By I. R. Moores, President.

(SEAL)

OREGON CENTRAL RAILROAD COMPANY.

By Geo. E. Cole, Secretary.

OREGON AND CALIFORNIA RAILROAD COMPANY,

By Ben Holladay, President.

(SEAL)

OREGON AND CALIFORNIA RAILROAD COMPANY,

By A. B. Cunningham, Secretary.

DOLPH BRONOUGH DOLPH & SIMON,

Solicitors for Defendants.

UNITED STATES OF AMERICA,

District of Oregon.—ss.

I, A. G. Cunningham, being first duly sworn, say I am the Secretary of the Oregon and California Railroad Company, one of the Defendants to this suit, that I am acquainted with, have in my possession and am the legal custodian of the Corporate Seal of the Defendant the Oregon and California Railroad Company, that the seal affixed to the foregoing Answer is such corporate seal, and that the foregoing Answer is true, as I verily believe.

A. G. CUNNINGHAM.

Subscribed and sworn to before me, this 5th day of October, A. D. 1874.

RALPH WILCOX,

Clerk.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, George E. Cole, being first duly sworn, say I am the Secretary of the Oregon Central Railroad Company, one of the Defendants to this suit, that I am acquainted with, have in my possession and am the legal custodian of the Corporate Seal of the Defendant the Oregon Central Railroad Company, that the seal affixed to the foregoing Answer is such Corporate Seal, and that the foregoing Answer is true as I verily believe.

GEO. E. COLE.

Subscribed and sworn to before me, this 5th day of October, A. D. 1874.

RALPH WILCOX, Clerk.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

Due and personal service of Copy of Answer to Amended Complaint, in the above entitled suit, and of Copies of Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, of said Answer upon me at Portland in said District admitted this 5th day of October, A. D. 1874.

WM. H. EFFINGER,
Attorney for S. G. Elliott.

ANSWER TO AMENDED COMPLAINT

Filed this October 5, 1874.

RALPH WILCOX, Clerk.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Answer of the Oregon Central Railroad Company of Salem and the Oregon and California Railroad Company to the Amended Bill of Complaint, in cause No. 134, John Nightingale and Simon G. Elliott, vs. Oregon Central Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said

District this October 7, A. D., 1911.

G. H. MARSH,

(Seal)

Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,

Clerk U. S. District Court.

61-B.

[Complainant's Exhibit 61-B.]

GEO. A. BRODIE,

U. S. Examiner.

EXHIBIT G.

CONVEYANCE.

KNOW ALL MEN BY THESE PRESENTS, That we the undersigned Ben Holladay and Company of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company at Salem, Oregon, of all certain Contracts in writing heretofore existing between said Company and the undersigned, in relation to the construction of a railroad and telegraph line, from Portland, Oregon, through the Willamette, Umpqua and Rogue River Valleys to the California line, and the agreement of such Company to pay the undersigned for all moneys laid out, expended and incurred under such contracts, to-wit: An amount not less than eight hundred thousand dollars, in U. S. gold coin; it being a part of the arrangement that all the property hereinafter specified should be transferred and delivered to said Company and in consideration of the full sum

of one dollar to us in hand paid the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered, and conveyed, and by these presents we Ben Holladay and Company do sell, assign, set over, transfer, deliver, and convey unto said Oregon Central Railroad Company of Salem, Oregon, All saw mills, and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing, tackle, and all leases, and all property of every name and nature now owned by and in possession of Ben Holladay & Co., all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing, tackle, railroad ties, iron rail, spike, and other railroad materials now and hertofore used by us in the construction of the Oregon Central Railroad Company, it being the intention of this conveyance to transfer, to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon. To Have and to Hold the said property, and every part there of unto the said Oregon Central Railroad Company of Salem, Oregon, its successors, assigns, absolutely and forever.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 28th day of March, A. D. 1870.

BEN HOLLADAY.

C. TEMPLE EMMET.

By Ben Holladay, Att'y. in fact.

BEN HOLLADAY & CO.

By Ben Holladay.

(Five cent U. S. Rev. Stamp
cancelled)

E XHIBIT G
OF ANSWER TO AMENDED COMPLAINT.

Filed October 5, 1874.

RALPH WILCOX, Clerk.

UNITED STATES OF AMERICA,
District of Oregon,—ss.

I. G. H. Marsh, Clerk of the United States Circuit Court for the District of Oergon, do hereby certify that the foregoing copy of Exhibit "G" to Answer to Amended Bill of Complaint, in cause No. 134, John Nightingale and Simon G. Elliott, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District this October 7, A. D., 1911.

G. H. MARSH,
Clerk.

(SEAL)

By
Deputy Clerk

[Complainant's Exhibit 61-C.]

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

EXHIBIT M.

Office of the Oregon Central Railroad Company,
Salem, Oregon, March 28th, A. D. 1870, 6 o'clock, P. M.

Pursuant to adjournment of the Board of Directors, ordered March 14, 1870, and of the call of the President, on notice given, the Board of Directors of the Company met at their office in Salem, this March 28th, 1870, at 6 o'clock P. M. Present—I. R. Moores, President, John F. Miller, A. Bush, J. H. Moores, Geo. L. Woods, J. C. Hawthorne, Geo. W. Weidler, A. L. Lovejoy, E. N. Cooke, J. H. Douthitt, Jacob Conser and James H. Foster.

I. R. Moores, President, in the chair, Geo. E. Cole, Secretary, and J. H. Mitchell, Attorney.

Wehreupon, the following communication from the Contractors Ben Holladay & Co., was presented and read, that is to say:

COMMUNICATION.

Office of Ben Holladay & Co.,)

Portland, Oregon, March 28th, 1870.)

To the President and Directors of the Oregon Central
Railroad Company:

Gentlemen:—Under the following existing contracts, to-wit: A contract or memorandum of agreement, made the 23rd day of April, A. D. 1867, by and between the Oregon Central Railroad Company, of the first part, and of A. J. Cook, of the second part; also, a contract or agreement supplemental thereto and amendatory there-

of, made and entered into between the said Oregon Central Railroad Company of the first part, and the said A. J. Cook, or A. J. Cook & Company, of the other part, the 27th day of November, 1867. Also, a certain other contract or articles supplementary thereto or amendatory thereof, made the 10th day of June, A. D. 1868, between the Oregon Central Railroad Company, of the one part, and A. J. Cook & Co., of the other part, and also a certain other contract or memorandum of agreement, made the 12th day of May, 1868, by and between the Oregon Central Railroad Company, of the first part, and the firm of A. J. Cook & Company, of the second part. All of which contracts and agreements, original and supplemental, were, on the 12th day of September, A. D. 1868, by the consent, and with the agreement of your Company, assigned, transferred and set over to the undersigned.

The undersigned, Ben Holladay and Company, have constructed, and equipped twenty miles of railroad and telegraph line, commencing at East Portland, and running thence Southerly, and have in such work, and in further work done under such contracts, and agreements, expended moneys and incurred liabilities to a large amount, that is to say: to an amount not less than eight hundred thousand (\$800,000) dollars, in U. S. gold coin, nor more than one million (\$1,000,000) dollars, the exact amount of which cannot now be stated.

That, owing to the fact, that ever since the undersigned purchased into such contracts, one or more actions, or suits, have been pending in the courts of Ore-

gon, wherein the right to the use your corporate name has been questioned by another Company; the securities and stocks of your Company received under such contracts have been rendered almost valueless, and your contractors have, for such reason, been prevented from negotiating the same, and from proceeding with the construction of the railroad commenced and partly completed.

Under these circumstances we respectfully submit the following propositions for your consideration and acceptance:

First. All bonds of the Oregon Central Railroad Company delivered under or in pursuance of any of the contracts aforesaid, shall be surrendered up to the Company.

Second. All stocks of the Oregon Central Railroad Company standing on its books in the name of Ben Holladay & Company, shall, within one month from this date be surrendered and delivered up to your Company to be cancelled.

Third. The Oregon Central Railroad and Telegraph line, so far as completed, together with all uncompleted portions of the same, including all rolling stock and other property, belonging thereto, or connected therewith, (shall be surrendered up and delivered to the possession of the Oregon Central Railroad Company,) and all mills, machine shops, machinery, tools, implements, horses, mules, carts, oxen, livestock, and all property of every name and description, now owned by or standing in the name of Ben Holladay and Company, in Oregon, or in their possession, and intended for use in and about the

construction of such railroad," shall be transferred, conveyed and delivered to your Company.

Fourth. The Oregon Central Railroad Company, by resolution of the Board of Directors, assume and agree to pay, or cause to be paid to Ben Holladay and Company, within two years from this date the full amount in Gold coin of the United States, of the moneys expended, the liabilities incurred as aforesaid by said Ben Holladay & Co., including all expenses incurred and money paid by said Company in defending the corporate rights of such corporation, and in securing and establishing its franchises, the exact amount of all which is not less than eight hundred thousand (\$800,000) dollars, nor more than one million (\$1,000,000) dollars, and shall be settled and agreed upon by a committee consisting of one member of your Board of Directors and one member of the firm of Ben Holladay & Co., and if they cannot agree they two shall select a third as umpire, whose decision shall be final, interest to be paid on such amount from date, at the rate of one per cent. per month.

Fifth. All the contracts and agreements herein before referred to shall be cancelled by both parties.

Your early consideration of these propositions is respectfully requested at an early day, and should they meet with your approval, a resolution of your Board of Directors accepting them and agreeing to the terms proposed shall be recognized by us as an execution by both parties, of a contract between the Oregon Central Railroad Company, and ourselves on the terms and condi-

tions herein proposed, and in such event the following endorsement shall be placed across the face of the Original Contracts, and whereby the same shall be cancelled, and signed by both parties to-wit:

“In consideration of One Dollar paid by each of the
 “parties hereto by the one to the other, and the receipt
 “whereof is by each of the parties hereto hereby ac-
 “knowledged and in consideration of other valuable con-
 “siderations moving from each to the other. It is hereby
 “agreed between the Oregon Central Railroad Company,
 “and Ben Holladay & Co. parties to the within Con-
 “tract, that the within contract be, and the same is here-
 “by cancelled, set aside and held for naught. Witness
 “the hands of Ben Holladay & Co. and the Oregon Cen-
 “tral Railroad Company by the signatures of I. R.
 “Moore, President and Geo. E. Cole, Secretary, there-
 “of and the seal of said Corporation attached this
 “March A. D. 1870. And an agreement in writing duly
 “executed and stamped by the parties embodying the
 foregoing shall also be entered into.

Very respectfully,

BEN HOLLADAY & CO.

Whereupon J. H. Moore presented the following preamble and Resolution, which upon motion of A. L. Lovejoy were unanimously adopted.

Whereas, the following communication has been received by this Company from Ben Holladay and Company Contractors: That is to say:

Office of Ben Holladay & Co.,
 Portland, Oregon.

March 28th 1870.

To the President and Directors of the Oregon Central
Railroad Company,

Gentlemen: Under the following existing Contracts, To wit: a Contract or memorandum of agreement made the 23rd day of April A. D. 1867, by and between, the Oregon Central Railroad Company, of the first part and A. J. Cook of the second part, also a Contract or agreement supplemental thereto and amendatory thereof, made and entered into between the said Oregon Central Railroad Company, of the one part and the said A. J. Cook, or A. J. Cook and Company of the other part, the 27th day of November, A. D. 1867. Also a certain other Contract or Articles Supplementary thereto or amendatory thereof made the 10th day of June A. D. 1868 between the Oregon Central Railroad Company of the one part and A. J. Cook & Co. of the other part, and also a certain other Contract or memorandum of writing, made the 12th day of May A. D. 1868 by and between the Oregon Central Railroad Company of the first part, and the firm of A. J. Cook & Company of the second part, all of which Contracts and agreements original and supplementary were on the day of September, A. D. 1868, by the consent and with the agreement of your Company, assigned transferred and set over to the undersigned. The undersigned Ben Holladay and Company, have constructed and equipped twenty miles of Railroad and Telegraph line commencing at East Portland and running thence Southerly, and have in such work and in further work done, under such

contracts and agreements expended money and incurred liabilities to a large amount that is to say; to an amount not less than eight hundred thousand (\$800,000) dollars in United States Gold Coin, nor more than one Million (\$1,000,000) Dollars the exact amount of which cannot be stated. That owing to the fact that ever since the undersigned purchased into such contracts, one or more actions or suits have been pending in the Courts of Oregon, wherein the right to the use of your Corporate name has been questioned by another Company, the securities and stock of your Company received under such Contracts have been rendered almost valueless, and your Contractors have for such reason been prevented from negotiating the same, and from proceeding with the construction of the Railroad commenced, and partly completed. Under these circumstances we respectfully submit the following proposition for your consideration and acceptance.

First. All bonds of the Oregon Central Railroad Company, delivered under, or in pursuance of any of the contracts aforesaid, shall be surrendered up to the Company.

Second. All stocks of the Oregon Central Railroad Company standing on the books in the name of Ben Holladay and Company, shall, within one month from this date, be surrendered and delivered up to your Company.

Third. The Oregon Central Railroad and Telegraph line, so far as completed, together with the incompleated portion of the same, including all rolling stock and other property belonging therto or connected therewith, shall

be surrendered up and delivered to the possession of the Oregon Central Railroad Company, and all mills, machine shops, machinery, tools, implements, horses, mules, carts, oxen, live stock, and all property of every name and description now owned by, or standing in the name of, Ben Holladay and Company, in Oregon, or in their possession and intended for use in and about the construction of such railroad, shall be transferred, conveyed and delivered to your Company.

Fourth. The Oregon Central Railroad Company shall by a resolution of the Board of Directors, assume and agree to pay, or cause to be paid, to "Ben Holladay and Company," within two years from this date the full amount, in gold coin of the United States, of the moneys expended, the liabilities incurred as aforesaid by said Ben Holladay & Co., including all expenses incurred and money paid not by said Company, in defending the Corporate right of such corporation, and in securing and establishing its franchises, the exact amount of all of which is not less than eight hundred thousand (\$800,000) dollars, nor more than one million (\$1,000,000) dollars, and shall be settled and agreed upon by a committee, consisting of one member of your Board of Directors and one member of the firm of Ben Holladay & Company, and if they cannot agree they two shall select a third as umpire, whose decision shall be final; interest to be paid on such amount from date, at the rate of one per cent. per month.

Fifth. All the contracts and agreements herein referred to shall be cancelled by both parties.

Your early consideration of these propositions is respectfully requested at an early day; and should they meet with your approval a resolution of your board of directors accepting them and agreeing to the terms proposed, shall be recognized by us as an execution by both parties of a contract between the Oregon Central Railroad Company and ourselves, on the terms and conditions herein proposed, and in such event the following endorsement shall be placed across the face of the original contracts and whereby the same shall be cancelled by both parties, to wit:

“In consideration of one dollar paid by each of the parties herto, by the one to the other, and the receipt whereof is by each of the parties hereto, hereby acknowledged, and in consideration of other valuable considerations moving from each to the other, it is hereby agreed between the Oregon Central Railroad Company and Ben Holladay and Company, parties to the within contract, that the within contract be and the same is hereby cancelled, set aside and held for naught.

“Witness the hands of Ben Holladay & Co., and the Oregon Central Railroad Company, by the signatures of I. R. Moores, President, and Geo. E. Cole, Secretary, thereof, and the seal of said corporation, attached thisMarch A. D. 1870.” An agreement in writing, duly executed and stamped by the parties, embodying the foregoing, shall also be entered into.

Very respectfully,

(Signed)

BEN HOLLADAY & CO.

And Whereas, the statements contained in such com-

munication are true:

Therefore, resolved, That this corporation do hereby accept the propositions contained in such communication of Ben Holladay and Company.

Resolved, That the Company do hereby accept and receive from said Ben Holladay and Company the railroad and telegraph line of the Oregon Central Railroad Company, so far as completed, together with all uncompleted parts, including also all the property and rolling stock owned by such Company, including also all stock in this Company standing on its books in the name of Ben Holladay and Company, which stock shall be transferred at the request of this Company, including all the property standing in the name of Ben Holladay and Co., or in their possession, as stated in the foregoing communication.

Resolved, That in consideration thereof, this Company agrees to pay Ben Holladay & Co. the whole cost of construction of such road, including all costs and expenses hereinbefore referred to in such communication, and the said amount of all which shall be ascertained, settled and agreed upon in the manner prescribed in such communication, and the same shall be paid in United States Gold coin, within two years from this date, together with interest from this date, at one per cent. per month in like coin.

Resolved, That all said contracts referred to in the communication aforesaid, be, and the same are, hereby rescinded, and the President and Secretary of this Company are hereby directed to cancel each thereof, in the

manner prescribed in such communication aforesaid.

Resolved, That the President and Secretary of this Company be, and they are hereby, instructed to enter into a written contract with said Ben Holladay & Co., on behalf of this Company, and in its name, which contract shall embody the provisions and purposes contained in these resolutions.

The following communication from the Oregon and California Railroad Company was presented by the Attorney of this Company, which was read, and, on motion of A. L. Lovejoy, was ordered spread upon the records, to wit:

COMMUNICATION.

Office of the Oregon and California Railroad Company.

Portland, Oregon, March 28th, 1870.

To the President, Stockholders and Board of Directors of the "Oregon Central Railroad Company" of Salem, Oregon.

Gentlemen:—I respectfully beg leave to submit for your consideration the following proposition from the Oregon and California Railroad Company, which I do in the form of the following resolution of the Board of Directors of that Corporation, passed March 26th, A. D. 1870, at the office of their Company in Portland, Oregon, to wit:

Resolved, That the President of this Company be, and he is hereby authorized and instructed to enter into negotiation with the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22nd, 1867, for the purchase by this Company of the railroad of such corpo-

ration now partly completed and in progress of construction, including all the rolling stock and other property connected therewith, and including also all the property, real, personal and mixed, now owned by such Oregon Central Railroad Company, or to which it may in anywise be entitled, and including also all franchises of said corporation which it now owns, or to which it is or may be entitled by virtue of any Act or Resolution of Congress, or of the Legislature of the State of Oregon, or in any way or manner, and for such purpose, The President of this Company is further authorized to agree in writing in the name of this corporation, and under its seal for such purchase by, and transfer to, this Company all of such property, rights and franchises, upon the following terms, to-wit:

That in consideration of such conveyance, transfer and delivery to this Company, it shall agree to and with the Oregon Central Railroad Company, its directors and stockholders, to assume, and shall assume and agree to pay all the debts and liabilities of such Oregon Central Railroad Company, as the same mature and become due, and payable of whatever name and nature, and this Company shall also indemnify and forever keep harmless the said Oregon Central Railroad Company from any and all such payments, and from all liabilities whatever, of every name and nature for which said Oregon Central Railroad Company may be liable at the date of the acceptance of these propositions.

To the propositions contained in the foregoing resolution an early answer is desired.

Very respectfully

BEN HOLLADAY,

President of Oregon and
California Railroad Company.

Thereupon in answer to such communication, A. L. Lovejoy offered the following preamble and resolutions which, upon his motion, were unanimously adopted:

Whereas, The following communication has this day been received by this Company from the Oregon and California Railroad Company, a corporation incorporated and organized at Portland, Oregon, March 17th, 1870, for the purpose of constructing a railroad and telegraph line from Portland, Oregon, southerly, through the Willamette, Umpqua and Rogue River Valleys, to the South boundary of Oregon, in accordance with an Act of Congress approved July 25th, A. D. 1866, granting lands for such purpose and amendments thereto, to-wit:

Office of the Oregon and California Railroad Company,
Portland, Oregon, March 28th, 1870.

To the President and Board of Directors of the Oregon
Central Railroad Company of Salem, Oregon.

Gentlemen:—I respectfully beg leave to submit for your consideration the following proposition from the Oregon and California Railroad Company, which I do in the form of the following resolution of the Board of Directors of that corporation, passed March 26th, A. D. 1870, at the office of their Company in Portland, to-wit:

Resolved, That the President of this Company be, and he is hereby authorized and instructed to enter into negotiations with the Oregon Central Railroad Com-

pany of Salem, Oregon, incorporated April 22nd, 1867, for the purchase by this Company of the railroad of such corporation, now partly completed and in progress of construction, including all the rolling stock and other property connected therewith, and including also all the property, real, personal and mixed, now owned by such Oregon Central Railroad Company, or to which it may in any wise be entitled, and including also all franchises of the said corporation which it now owns, or to which it is or may be entitled by virtue of any Act or Resolution of Congress, or of the Legislature of the State of Oregon, or in any way or manner, and for such purpose the President of this Company is further authorized to agree in writing in the name of this corporation and under its seal for such purpose, by and transfer to this Company of all such property, rights and franchises, upon the following terms, to-wit: That in consideration of such conveyance, transfer and delivery to this Company, it shall agree to and with its Directors and stockholders to assume, and shall assume, and agree to pay all the debts and liabilities of such Oregon Central Railroad Company, as the same mature, and become due and payable, of whatever name and nature, and this Company shall also indemnify and forever keep harmless the said Oregon Central Railroad Company, from any and all such payments, and from all liability whatever, of every name and nature, for which said Oregon Central Railroad Company may be liable at the date of the acceptance of these propositions.

To the propositions contained in the foregoing resolu-

tion an early answer is desired.

Very respectfully,

(Sd) BEN HOLLIDAY.

President of Oregon and California Railroad Company.

And, whereas, This Company is today indebted in a large amount, to-wit: in a sum not less than eight hundred thousand (\$800,000) dollars, nor more than dollars, in gold coin of the United States, and which former sum is equivalent in value under existing circumstances to that of all the property and franchises owned or possessed by this Company, or to which it is in any wise entitled; and

Whereas, There has heretofore existed divers controversies in the Courts, and there is one suit still pending of a similar nature, wherein the right of this Company to use its corporate name has been, and is questioned, by another Company, and by reason whereof the securities of this Company have been weakened and rendered comparatively valueless, and which have prevented this Company and its contractors from negotiating the same, and from proceeding with the construction of its railroad, and which have resulted in this Company being driven to a cancellation of its contracts for the construction thereof; therefore,

Resolved, That it is the judgment of this Board that it is for the best interests of this Company, and all its stockholders, to accept the proposition embodied in the foregoing communication.

Resolved, That this Company do (subject, however, to the approval of a majority vote of the stock of this

corporation) accept the foregoing proposition of the Oregon and California Railroad Company.

Resolved, That the President and Secretary of this Company be, and they are hereby authorized and directed, to enter into an agreement in writing in the name of this Company with said Oregon and California Railroad Company, for a sale of all the property and franchises of this corporation upon the terms embodied in the foregoing proposition, which agreement shall, however, be subject to the approval or disapproval of a vote of a majority of the stock in this Company at a stockholders' meeting hereafter to be held.

Whereupon, the following conveyance and contracts being executed and submitted to the Board, were, on motion of G. L. Woods, by a unanimous vote ordered to be spread upon the record.

CONVEYANCE.

KNOW ALL MEN BY THESE PRESENTS, That we the undersigned Ben Holladay and Company of Portland, Oregon, in consideration of the cancellation this date by the Oregon Central Railroad Company of Salem, Oregon, of all certain Contracts in writing heretofore existing between said Company and the undersigned, in relation to the construction of a railroad and telegraph line, from Portland, Oregon, through the Willamette, Umpqua and Rogue River Valleys to the California line, and the agreement of such Company to pay the undersigned for all moneys laid out, expended and incurred under such contracts, to wit: An amount not less than eight hundred thousand dollars, in U. S.

Gold coin; it being a part of the arrangement that all the property hereinafter specified should be transferred and delivered to said Company and in consideration of the full sum of one dollar to us in hand paid the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered, and conveyed, and by these presents we Ben Holladay and Company do sell, assign, set over, transfer, deliver, and convey unto said Oregon Central Railroad Company of Salem Oregon, All saw mills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing, tackle, and all leases, and all property of every name and nature now owned by and in possession of Ben Holladay & Co., all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing, tackle, railroad ties, iron rail, spike, and other railroad materials now and heretofore used by us in the construction of the Oregon Central Railroad Company, it being the intention of this conveyance to transfer to said Oregon Central Railroad Company all property real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon. To Have and to Hold the said property and every part thereof unto the said Oregon Central Railroad Company of Salem, Oregon, its successors, and assigns, absolutely and forever.

IN WITNESS WHEREOF, we have hereto set our hands and seals this 28th day of March, A. D. 1870.

BEN HOLLADAY,

C. TEMPLE EMMET,

By Ben Holladay, Att'y in fact.

BEN HOLLADAY & Co.

By Ben Holladay.

(Five Cent U. S. Rev. Stamp Cancelled.)

AGREEMENT

Memorandum of Agreement, entered into this 28th day of March A. D. 1870. Between the "Oregon Central Railroad Company," a Corporation, incorporate at Salem, Oregon, the 22nd day of April A. D. 1867, party of the first part and Ben Holladay and Company of Portland, party of the second part.

Whereas, The parties of the second part Ben Holladay and Company did on the 12th day of September A. D. 1868, by and with the consent and agreement of the said "Oregon Central Railroad Company," party of the first part herein, take assignment of certain contracts in writing then existing between said party - of the first part herein, and one A. J. Cook, and A. J. Cook & Co., which contracts related to the construction of a Railroad and telegraph line, from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys to the California line, and for a lateral road through Benton County, Oregon, and for the equipment of such roads, which contracts bear date as follows: One, April 23rd, 1867, between the "Oregon Central Railroad Company."

and Albert J. Cook, one supplemental thereto and amendatory thereof, between said "Oregon Central Railroad Company," and said A. J. Cook or A. J. Cook & Co. dated on or about the 27th day of November, A. D. 1867, also one certain other contract or articles supplementary thereto or amendatory thereof, made on or about the tenth (10th) day of June, A. D. 1868, between said "Oregon Central Railroad Company," and said A. J. Cook & Co., also a certain other contract or memorandum of agreement made on the 12th day of May, A. D. 1868, or thereabouts between the same parties.

And Whereas, The parties of the second part herein have, in pursuance of such contracts, completed twenty miles of such railroad and telegraph, running from East Portland southerly, and have equipped the same, and have done other large amounts of work in the further construction of such road under such contracts, and the said Ben Holladay & Co. have expended, in all, under such contracts, and incurred liabilities in constructing such road and furnishing materials therefor, and in divers other ways and manners connected with the prosecution of such work under such contracts, including large expenses paid in litigation, in defending the rights of the Company, party of the first part, herein, and in securing and defending its franchises and establishing its rights, and in procuring right of way, amounting in all to a sum total, in U. S. gold coin, in not less than eight hundred thousand (\$800,000) dollars, nor more than one million (\$1,000,000) dollars, the exact amount of which cannot now be more nearly stated; and

Whereas, owing to certain controversies that have arisen from time to time in the courts of Oregon, one of which is still pending and undetermined, wherein the right of the corporation, party of the first part herein, to the use of its corporate name has been and still is questioned by another corporation, claiming the right of such corporate name, the stock and securities of the corporation, party of the first part herein, have been clouded and greatly weakened and rendered almost valueless and wholly unsaleable in the markets.

Therefore, in consideration of the premises aforesaid, and of the sum of one dollar paid to each of the parties hereto, by the one to the other, and the receipt where of is hereby acknowledged, and of the mutual agreements of the parties hereto, it is agreed by and between the parties herto as follows:

First, That the parties of the second part herein, shall surrender and deliver up, to be cancelled to the Oregon Central Railroad Company, party of the first part herein, all bonds of such corporation heretofore delivered under or in pursuance of any of the contracts aforesaid

Second. All stock of the Oregon Central Railroad Company standing on its books in the name of Ben Holladay and Company, or owned by such firm, shall, within one month from this date, be surrendered and delivered up to the corporation, party of the first part, or to such person as such Company, through its Directors or stockholders may designate, to be cancelled or otherwise disposed of.

Third. The Oregon Central Railroad and Telegraph

Line, so far as completed, together with all uncompelted portions of the same, including all rolling stock, and other property belonging thereto or connected therewith, shall be and is hereby surrendered up and delivered over to the possession, ownership and control of the Oregon Central Railroad Company, party of the first part herein.

Fourth. The Oregon Central Railroad Company, party of the first part herein, shall pay or cause to be paid to Ben Holladay and Company, within two years from this date, in United States gold coin, together with interest thereon from date, at one per cent. per month, the full amount of all the moneys expended, and liabilities incurred as aforesaid, by said Ben Holladay and Company, including all expenses incurred and moneys paid by such Company in defending the corporate rights of the party of the first part herein, and in securing and establishing its franchises, the exact sum total of all which is not now definitely known, but the sum is not less than eight hundred thousand (\$800,000) dollars, no more than one million (\$1,000,000) dollars, and the same shall be ascertained, settled and agreed upon by I. R. Moores, President and one of the Directors of the party of the first part, and Ben Holladay, one of the parties of the second part, and in case they cannot agree they two shall select an umpire, whose decision shall be final, and the said amount shall be so ascertained and agreed upon within three months from this date.

Fifth. All the said contracts and agreements hereinbefore referred to shall be, and they are, each and all

of them, hereby cancelled.

Sixth. Ben Holladay and Company, party of the second part herein, shall, of even date with these presents, and in consideration of the agreements herein contained, make, execute, and deliver to the Oregon Central Railroad Company, party of the first, a conveyance and transfer of all the mills, machinery, ties, and other railroad material, horses, mules, oxen, tools, implements, carts, drays, wagons, now owned by Ben Holladay & Company in Oregon, and heretofore and now used in and about the construction of said railroad, together with all the property owned by or belonging to Ben Holladay and Company in Oregon.

IN TESTIMONY WHEREOF, the Oregon Central Railroad Company, party of the first part herein, has caused its corporate seal to be attached, and witness also the signatures of I. R. Moores, its President, and Geo. E. Cole, its Secretary; also witness the hands of Ben Holladay and Company, party of the second part herein.

OREGON CENTRAL RAILROAD COMPANY,

By I. R. Moores, President.

OREGON CENTRAL RAILROAD COMPANY,

By Geo. E. Cole, Secretary.

BEN HOLLADAY & CO.

By Ben Holladay.

(Ten Cents U. S. R. S. Cancelled.)

(Seal of Corporation attached.)

Witness present,

A. G. CUNNINGHAM,

AGREEMENT

ARTICLES OF AGREEMENT, made and entered into this 28th day of March, 1870, between the "Oregon Central Railroad Company," a corporation incorporated at Salem on the 22nd day of April, A. D. 1867, under the general incorporation law of the State of Oregon, and amendments thereto, party of the first part, and the "Oregon and California Railroad Company," a corporation incorporated at Portland, Oregon, on the 17th day of March, A. D. 1870 under the laws of Oregon aforesaid, party of the second part.

Whereas, The party of the first part herein is the owner of the "Oregon Central Railroad" partly completed and in course of construction, and rolling stock, and other valuable property and franchises, including all the rights, privileges, benefits, franchises and immunities granted and conferred on the Oregon Company; by an Act approved July 25th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the "Central Pacific Railroad" in California, to Portland, in Oregon," approved July 25th, A. D. 1866, and amendments thereto.

And, Whereas, Said "Oregon Central Railroad Company," party of the first part herein, is largely indebted to divers persons, but principally to Ben Holladay and Company, in an amount not less than eight hundred thousand (\$800,000) dollars, nor more than dollars, the exact amount of which is hereafter to be ascertained.

And, Whereas, It has been agreed, as will more fully appear by the following communication and proposi-

tions, presented to the "Oregon Central Railroad Company," party of the first part herein, by the Oregon and California Railroad Company," party of the second part herein, and the resolution of the Board of Directors of the said "Oregon Central Railroad Company" party of the first part, in answer thereto, that the said "Oregon Central Railroad Company" party of the first part, shall sell and convey unto the said "Oregon & California Railroad Company" party of the second part, all the railroad and other property, both personal and real, and all the rights, franchises, privileges, and property whatsoever of every name, nature and characters, in consideration of an agreement upon the part of the "Oregon and California Railroad Company" to assume and pay as they may mature and become due, all the debts and liabilities of every name and nature, of the said "Oregon Central Railroad Company," and the further agreement to forever save, indemnify and keep harmless, the said "Oregon Central Railroad Company" and its stockholders and Directors, from all such debts and liabilities, which communication and proposition, so made as aforesaid, are as follows:

Office of Oregon and California Railroad Company

Portland, Oregon, March 28th, 1870.

To the President and Board of Directors of the "Oregon Central Railroad Company" of Salem, Oregon:

Gentlemen:—I respectfully beg leave to submit for your consideration the following proposition from the "Oregon and California Railroad Company," which I

do in the form of the following resolution of the Board of Directors of that corporation passed March 20th A. D. 1870, at the office of their company in Portuand, Oregon, to-wit:

Resolved, That the President of this Company be, and he is hereby authorized and instructed to enter into negotiations with the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22d, 1867, for the purchase by this Company of the railroad of such corporation, now partly completed and in progress of construction, including all the rolling stock and other property connected therewith, and including also all the property, real, personal and mixed, now owned by such "Oregon Central Railroad Company" or to which it may in anywise be entitled, and including also all franchises of the said corporation, which it now owns or to which it is or may be entitled by virtue of any Act or Resolution of Congress, or of the Legislature of the State of Oregon, or in any other way or manner, and for such purpose the President of this Company is further authorized to agree in writing in the name of this corporation and under its seal for the purchase by, and transfer to this Company of all such property, rights and franchises, upon the following terms, to wit:

That in consideration of such conveyance, transfer and delivery to this Company, it shall agree to and with the said "Oregon Central Railroad Company" and to and with its Directors and stockholders, to assume and shall assume, and agree to pay all the debts and liabilities of such "Oregon Central Railroad Company," as the same

mature and become due and payable, of whatever name or nature, and this Company shall also indemnify, save and keep harmless the said "Oregon Central Railroad Company," from any and all such payments, and from all liability whatever of every name and nature for which said "Oregon Central Railroad Company" may be liable at the date of the acceptance of these propositions. And,

Whereas, In response to the foregoing communication the said "Oregon Central Railroad Company" did, on the 28th day of March, A. D. 1870, by the Board of Directors adopt the following resolution, to-wit:

Whereas, The following communication has this day been received by this Company from the "Oregon and California Railroad Company." a corporation incorporated and organized at Portland, Oregon, March 17th, 1870, for the purpose of constructing a railroad and telegraph line from Portland, Oregon, Southerly, through the Willamette, Umpqua and Rogue River Valleys, to the South boundary of Oregon, in accordance with an Act of Congress, approved July 25th A. D. 1866, granting lands for such purpose, and amendments thereto, to-wit:

Office of the Oregon and California Railroad Company.

Portland, Oregon, March 28th, 1870.

To the President and Board of Directors of the Oregon Central Railroad Company—Gentlemen: I respectfully beg leave to submit for your consideration the following proposition from the "Oregon and California Railroad Company," which I do in the form of the fol-

lowing resolution of the Board of Directors of that corporation, passed March 26th, A. D. 1870, at the office of their Company, in Portland, to-wit:

Resolved, That the President of this Company be, and he is hereby authorized and instructed to enter into negotiations with the "Oregon Central Railroad Company" of Salem, Oregon, incorporated April 22d, 1867, for the purchase by this Company of the railroad of such corporation, now partly completed and in progress of construction, including all the rolling stock and other property connected therewith, and including also all the property, real, personal and mixed, now owned by such "Oregon Central Railroad Company," or to which it may in any wise be entitled, and including also all franchises of said corporation, which it now owns, or to which it is or may be entitled by virtue of any Resolution of Congress, or of the Legislature of the State of Oregon, or in any way or manner, and for such purpose the President of this Company is further authorized to agree in writing, in the name of the corporation and under its seal, for such purchase by, and transfer to, this Company, of all such property, rights and franchises, upon the following terms, to-wit:

That in consideration of such conveyance, transfer and delivery to this Company, it shall agree to and with its Directors and stockholders, to assume and shall assume, and agree to pay all the debts and liabilities of such "Oregon Central Railroad Company," as they mature and become due and payable, of whatever name and

nature ,and this Company shall also indemnify and forever keep harmless the said "Oregon Central Railroad Company," from any and all such payments, and from all liability whatever, of every name and nature, for which said "Oregon Central Railroad Company" may be liable at the date of the acceptance of these propositions.

To the propositions contained in the foregoing resolution an early answer is desired.

Very respectfully,

(Sd) BEN HOLLADAY.

President of Oregon and California Railroad Company.

And, Whereas, This Company is today indebted in large amounts, to-wit: in a sum not less than eight hundred thousand (\$800,000) dollars, nor more than dollars, in gold coin of the United States, and which former sum is equivalent in value, under existing circumstances to that of all the property and franchises owned or possessed by this Company, or to which it is in anywise entitled, And,

Whereas, There has heretofore existed divers controversies in the Courts, and there is one suit still pending of a similar nature, wherein the right of this Company to use its corporate name has been and is questioned by another Company, and by reason whereof the securities of this Company have been weakened and rendered comparatively valueless, and which have prevented this Company and its contractors from negotiating the same, and from proceeding with the construction of its railroad, and which have resulted in this Company

being driven to a cancellation of its contracts for the construction thereof. Therefore,

Resolved, That it is the judgment of this Board that it is for the best interests of this Company, and all its stockholders, to accept the proposition embodied in the foregoing communication.

Resolved, That this Company do (subject however to approval by a majority vote of the stock of this corporation) accept the foregoing proposition of the "Oregon and California Railroad Company."

Resolved, That the President and Secretary of this Company be, and they hereby are authorized and directed to enter into an agreement in writing in the name of this Company, with the "Oregon and California Railroad Company," for a sale of all the property and franchises of this corporation, upon the terms embodied in the foregoing proposition, which agreement shall, however, be subject to the approval of a vote of a majority of the stock in this company, at a stockholders meeting hereafter to be held.

Therefore, in consideration of the premises, and of the valuable considerations moving from one to the other as hereinbefore stated.

The said "Oregon Central Railroad Company" party of the first part, does hereby sell and agree to convey within one week from this date, to the "Oregon and California Railroad Company," party of the second part herein, the whole of the "Oregon Central Railroad and Telegraph Line," and all the rolling stock of such road, and also all property, real and personal, and mixed, now

owned by the "Oregon Central Railroad Company," of whatsoever name and nature, and all the rights of way, privileges, franchises, and interests whatsoever, both legal and equitable, which the said corporation, party of the first part herein, now has, or owns, and especially, all the lands, rights, franchises, privileges, emoluments, and benefits whatever, which the "Oregon Central Railroad Company," party of the first part herein, now has, or owns, or to which it is or may be entitled, either legally or equitably, by virtue of the Acts of Congress aforesaid, or either or any of them, or of any other Act of Congress, or of any Act or Resolution of the Legislature of the State of Oregon, or of the decision of any of the Federal or State Departments, or of the Federal or State Courts.

In consideration whereof, the said "Oregon and California Railroad Company," party of the second part herein, hereby covenants and agrees to and with the said "Oregon Central Railroad Company," party of the first part, to assume and agrees to pay, and it does hereby assume and agree to pay to whomsoever owing, or may hereafter be due or owing, whenever the same becomes due and payable, all of the debts, obligations, and liabilities, whatsoever, of the "Oregon Central Railroad Company," of whatsoever name, nature or amount, and in the gold coin of the United States, and the "Oregon and California Railroad Company" does further hereby covenant and agree to and with the "Oregon Central Railroad Company," party of the first part, to indemnify and forever save, and keep harmless, the said "Oregon

Central Railroad Company" against the payment, at any time hereafter, of any claim, or claims, demand, or demands, that now exist, or which may at any time hereafter arise, or come against such last named corporation, and against all loss, expenses, costs, disbursements, and damages whatsoever, which the party of the first part, may at any time hereafter be called upon to incur or pay by reason of any such claims or demnds.

In Testimony Whereof, the parties hereto, the "Oregon Central Railroad Company," party of the first part, by and through its President, I. R. Moores, and Geo. E. Cole, Secretary, and the "Oregon and California Railroad Company," party of the second part, by and through its President, Ben Holladay, and its Secretary, A. G. Cunningham, all of such officers being hereunto duly authorized and empowered, as aforesaid, have each caused their names, together with the signature of the said officers respectively, to be hereto subscribed, and their corporate seal attached, this 28th day of March, A. D. 1870.

OREGON CENTRAL RAILROAD COMPANY,

By I. R. Moores, President.

(Seal of Corporation attached.)

OREGON CENTRAL RAILROAD COMPANY,

By Geo. E. Cole, Secretary.

(Twenty Cent U. S. R. S. Cancelled.)

OREGON AND CALIFORNIA
RAILROAD COMPANY,

By Ben Holladay, President.

(Seal of Corporation attached.)

OREGON AND CALIFORNIA
RAILROAD COMPANY,

By A. G. Cunningham. Secretary.

Whereupon, on motion of J. F. Miller said conveyance was accepted and said contracts were ratified; and on motion of Geo. L. Woods, a recess was taken until tomorrow afternoon, 4 o'clock, P. M. March 29th, 1870.

I. R. MOORES, President.

GEO. E. COLE, Secretary.

EXHIBIT M.

OF ANSWER TO AMENDED COMPLAINT

Filed October 5, 1874.

Ralph Wilcox

Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Exhibit "M" to Answer to Amended Bill of Complaint, in cause No. 134, John Nightengale and Simon G. Elliott vs. Oregon Central Railroad Company and Oregon and California Railroad Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said

District this October 7, A. D. 1911.

(SEAL)

G. H. MARSH, Clerk.

By.....Deputy Clerk.

[Complainant's Exhibit.]

*In the Circuit Court of the United States Within and
for the District of Oregon.*

THE OREGON AND CALIFORNIA RAILROAD
COMPANY, a corporation,

Complainant,

vs.

MARIA de GRUBISSICH, nee MARIA de POUR-
TALES,

Defendant.

ANSWER TO BILL OF COMPLAINT BY WAY
OF CROSS BILL.

Comes now Marie de Grubissich, the defendant above named and answers to the bill of complaint by way of cross bill of the Oregon and California Railroad Company, plaintiff.

1. This defendant now and at all times hereafter saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for her to make answer to, answering says, that she admits that the plaintiff is, and at all of the times mentioned in said bill of complaint was, a corporation duly organized and existing under

the laws of the State of Oregon, having its principal place of business at Portland, in said State, and as such is authorized to acquire, own, construct and operate railroads and their appurtenances, and real property in connection with and incidental thereto, and other real property in said State; but defendant alleges that said plaintiff is not authorized to acquire, own or hold the real property described in said bill of complaint; that said property is not now and never has been and will not be connected with or incidental to any railroad now or heretofore owned, constructed or operated by defendant, or which plaintiff intends to hereafter acquire, own, construct or operate, and is not now and never has been necessary or convenient to the acquiring, owning, construction or operation of any railroad now or heretofore owned, constructed or operated by plaintiff, and that the owning, acquiring or holding of said real property by plaintiff would be beyond and apart from the objects and purposes for which said plaintiff was created and organized or the powers incidental thereto and would be unlawful.

2. Defendant admits that she is and at the times mentioned in said bill of complaint was, an alien and a subject of the Emperor of Austria-Hungary, and was, at the times mentioned in said bill of complaint a resident of the City of Tunis, Africa.

3. Defendant admits that the amount in dispute in this suit, exclusive of interest and costs exceeds the sum of Two thousand dollars.

4. Defendant admits all of paragraph numbered

“IV” in said bill of complaint .

5. Defendant denies that on or about the 22nd day of April, 1867, or at any other time, a corporation was formed under the general incorporation laws of the State of Oregon under the name of the Oregon Central Railroad Company as alleged in paragraph numbered “V” of said bill of complaint.

Defendant further answering says that she has no knowledge or information sufficient to form a belief as to whether on the 22nd day of April, 1867, or at any other time any agreement was entered into between any parties named or known by the name of the Oregon Central Railroad Company and alleged in said complaint to have been a corporation and S. G. Elliott, acting for A. J. Cook, for the construction of 150 miles of railroad, as alleged in paragraph numbered “VI” of said bill of complaint, or whether said alleged contract was thereafter modified by supplemental agreement dated November 27, 1867, or that on May 20, 1867, said S. G. Elliott duly or otherwise assigned 7|20 of said alleged contract to one Perrin, or whether the said Elliott and said Perrin formed a partnership under the name of A. J. Cook & Co., for the purpose of carrying out said alleged contract, or otherwise, or that on the 29th day of May, 1867, said Elliott assigned one tenth of said alleged contract to one, Flint, or that in April, 1868, said Elliott assigned 7|20 of said alleged contract to one Frohman, or that in March, 1868 said Elliott assigned 2|20 of said alleged contract to one Brooks or 1|20 thereof to Gardiner El-

liott; or that said S. G. Elliott, acting for or in behalf of A. J. Cook & Co., or otherwise, entered into another agreement or contract for the construction of any railroad, as alleged in said bill of complaint or otherwise, or that on the 2nd day of May, 1867, A. J. Cook, for the consideration of one dollar or otherwise, assigned said alleged contract of April, 1867, to said S. G. Elliott, as alleged in said bill of complaint and placing her answer upon that ground therefore denies the same.

6. Defendant admits that on the 12th day of September, 1868, Ben Holladay and C. Temple Emmet and S. G. Elliott formed a partnership under the firm name and style of Ben Holladay & Co., and that the said Ben Holladay was the owner of 24|40 interest in the said partnership and the assets thereof, and the said C. Temple Emmett was the owner of 10|40 and the said S. G. Elliott was the owner of 6|40 of said partnership and assets; but defendant says that she has no knowledge or information sufficient to form a belief as to whether said partnership was formed for the purpose of taking over by assignment the aforesaid alleged contracts, or whether the title or interest in said alleged contracts thereafter became vested in said partnership of Ben Holladay & Co. as alleged in said bill of complaint, and placing her answer on that ground denies the same.

7. Defendant admits that the said partnership of Ben Holladay & Co. on the 4th day of May, 1869, purchased and that there was conveyed to it by deed of

James Grindley the east half of the southeast quarter and lots 5 and 6 of section 29, in township 1 south of Range, 2 east, Willamette Meridian, and that said partnership purchased and there was duly conveyed to it by deed of Gardner Elliott, dated October 16, 1869, the north half of the northeast quarter of section 32, in township 1 south of Range 2, east, Willamette Meridian and that the said Ben Holladay & Co. entered into the exclusive possession of said respective parcels of land; but defendant says that she has no knowledge or information sufficient wherewith to form a belief as to whether the purchase by and the conveyance to said partnership and the entry into and holding of possession thereof was for the purpose of constructing any railroad, whether as alleged in said complaint or otherwise, or for the purpose of acquiring a site for a saw mill, or for the purpose of securing the timber therefrom for the manufacture of ties or bridge timbers, as alleged in said complaint, and therefore placing her answer upon that ground, denies the same.

8. Defendant further alleges that after the purchase by and conveyance to said Ben Holladay & Co. of the above described tracts of lands, the said Ben Holladay & Co. continued to own and hold the same and to be and remain in possession thereof until July 1879, at which time said partnership of Ben Holladay & Co. was dissolved, and all of the assets and property thereof, including the tracts or parcels of land above described, were acquired by and became vested in

said Ben Holladay individually.

9. Defendant further answering says that she has no knowledge or information sufficient to form a belief as to whether on the 28th day of March, 1870, or at any other time, the said Ben Holladay & Co., had a settlement with any party designated the Oregon Central Railroad Company, as alleged in said bill of complaint, and placing her answer upon that ground, denies the same; and defendant expressly denies that the said Ben Holladay & Co. made or entered into an agreement with any party designated the Oregon Central Railroad Company, and alleged in said bill of complaint to have been a corporation, in words and figures as alleged and set forth in paragraph number VIII of said bill of complaint, or any other contract or agreement whatsoever, by which it was agreed or intended to convey or transfer the real property described in said bill of complaint, and denies that by the said alleged agreement, or by any agreement or act whatsoever, the said Ben Holladay & Co., or Ben Holladay conveyed, or attempted or intended to convey the real estate hereinabove described to any party known as the Oregon Central Railroad Company, and alleged in said bill of complaint to have been a corporation, or to any person or persons or corporation whatsoever; and defendant denies that on the said 28th day of March, 1870, or at any other time, said alleged corporation the Oregon Central Railroad Company, entered into the possession of the real property hereinabove described or any part thereof.

And defendant denies that said Ben Holladay ever disclaimed any or all interest in said real property described in said bill of complaint, or that he would have executed any formal or other instrument or deed of further assurance or otherwise to complainant conveying thereto by specific description said real property if he had been so requested to do by said complainant.

10. Defendant further answering denies that said alleged corporation the Oregon Central Railroad Company, was ever the owner of said real property above described, or was ever in the possession of the same or any part thereof, and denies that said alleged corporation by a deed dated March 29th, 1870, as alleged in said bill of complaint, or at any other time or in any other manner whatsoever, conveyed, or agreed or intended to convey said real property or any part thereof, or any right, title, interest or estate therein, or thereto, or in or to any part thereof to the plaintiff, the Oregon & California Railroad Company; and defendant denies that said Oregon and California Railroad Company did on the 29th day of March, 1870, as alleged in said bill of complaint enter into the exclusive or any possession of the real premises described in said bill of complaint, and denies that said Oregon & California Railroad Company was ever, prior to the month of January, 1904, in any possession whatsoever of said real premises, or that said railroad company or its predecessors prior to said time claimed to own said premises, as alleged in said

bill of complaint, or made any claim of right or title thereto or did any act or thing hostile or adverse to the title and possession and right of possession of this defendant and her predecessors in title and interest in said real premises; and defendant alleges that the only improvements of any kind, permanent or otherwise, made upon said premises by said Oregon and California Railroad Company, was a wire fence which said railroad company caused to be constructed around and enclosing said premises; and defendant alleges that said fence was so constructed by said railroad company upon or around said land since the first day of January, 1904 and for the sole and exclusive purpose and with the intention on the part of said railroad company of attempting to seize and hold actual possession of said land continuously for ten years and to thereby obtain title thereto by adverse possession as against this defendant; and defendant denies that said railroad company has ever at any time placed any other improvements upon said real property, or any part thereof, and denies that said railroad company placed the said fence or any improvements upon said land in reliance upon any alleged agreement or deed of date March 28, 1870, as alleged in said bill of complaint, or any other agreement or deed whatsoever.

11. And defendant further answering says that she has no knowledge or information sufficient to form a belief as to whether said Oregon and California Railroad Company has paid a sum in excess of

\$1773.79, or any other sum as State, County and other lawful taxes duly and legally assessed against said premises, as alleged in said bill of complaint, and placing her answer upon that ground denies the same; and defendant expressly and specifically denies that said railroad company has paid any sum or amount whatsoever as or for taxes assessed against said real property, or for other purposes, in reliance upon any agreement or deed of date March 28, 1870, executed by the said Ben Holladay & Co. or Ben Holladay to the alleged corporation the Oregon Central Railroad Company, as alleged in said bill of complaint; or in reliance upon any agreement or deed whatsoever executed by said Ben Holladay, or other person or persons; and defendant alleges that if said Oregon & California Railroad Company has paid any sum or amount whatsoever as or for taxes assessed against said real property or otherwise such payment was voluntary and without lawful reason or right or excuse therefor.

12. Further answering defendant says that she has no knowledge or information sufficient to form a belief as to whether complainant has made diligent or any search for the alleged instrument dated March 28th, 1870, and set forth in paragraph numbered VIII of said bill of complaint, and placing her answer on that ground denies the same; and defendant expressly denies that said alleged copy of instrument as so set forth in said bill of complaint is a copy of any agreement or instrument of which it purports upon

such allegations in said bill of complaint to be; and denies that the said alleged instrument of which said alleged instrument dated March 28, 1870, and so set out in said bill of complaint, pretends upon said allegations to be a copy, was ever executed or delivered by said Ben Holladay & Co. or by Ben Holladay, or by any other person or persons whomsoever, to said Oregon Central Railroad, and denies that any instrument or agreement or deed of which said document set out in said bill of complaint is alleged to be a copy was ever lost or misliad, or destroyed at any time or place.

13. Defendant further answering alleges that after the purchase by and the conveyance to said co-partnership of Ben Holladay & Co. of the land described in said bill of complaint by the said James Grindley and the said Gardner Elliott, as alleged in said bill of complaint, said real property continued to be held and owned by said Ben Holladay & Co. up to and until the month of July, 1879, and defendant admit sthe allegation in said bill of complaint in paragraph numbered "X" thereof that by a suit commenced in the Circuit Court of the State of Oregon, in and for the County of Marion by Ben Holladay and C. Temple Emmett, as plaintiffs, against S. G. Elliott, Gardner Elliott, Thaddeus R. Brooks and J. B. Rogers, as defendants, such proceedings were had in said cause in said Cricuit Court and in the Supreme Court of said State as that the said co-partnership of Ben Holladay & Co. was in the month of July, 1879, duly

dissolved, and that the assets and property of said Ben Holladay & Co., not then or therefore sold or conveyed thereby became the property of said Ben Holladay, and defendant alleges that the real estate in said bill of complaint described had not then or theretofore been sold or conveyed by said partnership and the said Ben Holladay by the said dissolution of said partnership became the sole owner of said real property, and that the said Ben Holladay continued to be the sole owner and to have and hold the possession thereof up to and until the time of his death on the 8th day of July, 1887, as hereinafter alleged; and defendant denies that in the settlement of said co-partnership and in the dissolution thereof the said real property was treated and deemed or treated or deemed to be the property of the Oregon & California Railroad Company, or so recognized or understood by the said Ben Holladay or by all or any of the members of said firm of Ben Holladay & Co., as alleged in said bill of complaint.

14. Defendant further answering denies that said Ben Holladay died on the 8th day of July, 1877, as alleged in said bill of complaint, but alleges that he died on July 8th, 1887, and that on September 27, 1875, he duly executed his last Will and Testament in writing and that said Will was on the 11th day of October, 1887, duly established and admitted to probate by the County Court of Multnomah County, Oregon, and the estate of said Ben Holladay was thereafter duly administered according to law and the provisions of

said last Will and Testament, and the same was finally and forever settled and the administrator thereof finally discharged by said Court on September 10, 1900, and defendant admits that she is a granddaughter of said Ben Holladay, deceased, and that she was named in said Will as the residuary devisee of said Ben Holladay's estate, as alleged in said bill of complaint, and defendant alleges that pursuant to and by virtue of said Will and the devise therein and thereby to defendant, defendant did upon the death of said Ben Holladay succeed to and become seized and possessed of the real property described in said bill of complaint, and all right, title, interest and estate therein and thereto, subject only to the due and lawful administration of said estate and the expenses incident thereto and to sale and disposition therein for the payment and satisfaction of the just and lawful debts of said Ben Holladay, deceased; and defendant alleges that the said deeds of James Grindley and Gardner Elliott conveying said real property to said firm of Ben Holladay & Co. were duly recorded upon the County records of Clackamas County, Oregon, provided by law for the recording of deeds of conveyance and other written evidence of the title to real property, on July 24th, 1869, and October 16, 1869, respectively; that the said Clackamas County is the County in which said land and real premises are situate. That no deed of conveyance or other instrument conveying or agreeing or attempting to convey said premises or any interest therein by said Ben Holladay

& Co. or said Ben Holladay, other than the said last Will and Testament and the proceedings had in the said probate Court of Multnomah County, Oregon, thereon; was ever filed for record or recorded in said Clackamas County, or elsewhere.

15. Defendant further answering admits that said real property was not included in the inventory of said estate of Ben Holladay, deceased, but defendant says that she has no knowledge or information sufficient upon which to form a belief as to whether the administrator appointed to administer said estate, with a copy of the Will annexed, as alleged in said bill of complaint, did not claim said real property as a part of the estate of said Ben Holladay, deceased, and therefore placing her answer on that ground denies that said administrator did not claim said real property as a part of said estate; and defendant expressly denies that she has never made any claim to said real property described in said bill of complaint until the commencement of her said action as alleged in said bill of complaint; and plaintiff alleges that she has at all times since the death of said Ben Holladay and the establishing and probating of his said Will, claimed all of the property real, personal and mixed, and including the real property described in said bill of complaint, under the said residuary devise to her in said Will and which was not otherwise devised or bequeathed therein, or not lawfully sequestrated in the administering of said estate. And defendant alleges further that she has at all times since the death of said

Ben Holladay been the owner in fee simple and entitled to the possession of said real property, and that after the death of said Ben Holladay, and up to and until the month of January, 1904, she was in the sole and exclusive possession of said real property, and has so continued ever since in the sole and exclusive possession thereof except for the wrongful entry upon said premises by the said Oregon and California Railroad Company and the placing thereon by said railroad company of the fence as hereinbefore alleged, and the attempt of said railroad company thereby to obtain actual possession of said premises.

And defendant denies that her right as the owner in fee simple of said premises to recover the possession of said premises and the whole thereof and the rents, issues, and profits thereof from said railroad company, and to maintain suitable actions and proceedings at law herefor, is barred by the statute of limitations of the State of Oregon, and denies that ten years have elapsed since defendant's right to commence and maintain an action at law in ejectment against said railroad company to recover therefrom and to obtain the restoration to defendant of the possession of said real premises withheld by said railroad Company; and defendant alleges that her right of action against said railroad company for the possession of said real premises accrued in the month of January, 1904, and when said railroad company so as aforesaid wrongfully entered upon and fenced said premises and undertook to seize and withhold the pos-

session thereof from this defendant and in the attempt and with the design to deprive defendant of her property by holding and maintaining possession of said premises under a claim that such possession was adverse to the title and ownership of this defendant; and that said railroad was never at any time prior to the said month of January, 1904, in the possession of said premises, or any part thereof.

16. Defendant further answering admits that she did, as alleged in said bill of complaint, on the 13th day of March, 1911, commence an action at law in the Circuit Court of the United States, for the District of Oregon, in which the defendant herein is plaintiff, and the said Oregon & California Railroad Company is defendant to recover from said railroad company the possession of said real property as specifically described in the complaint in said action, and so as aforesaid wrongfully taken and withheld from defendant, and for the sum of \$100.00 as damages for the said wrongful withholding of the possession of said premises and the further sum of \$500.00 as and for the value of the rents, issues and profits of the said premises since the time of the entry thereupon by said railroad company, and defendant alleges that said action is now pending, but that all proceedings therein have by and order of this Court made herein been restrained and stayed.

17. Further answering defendant says that she has no knowledge or information sufficient to form a belief as to the truth of the matters and things alleg-

ed in paragraph numbered XII of said bill of complaint, and basing her answer on that ground she denies that on February 29th, 1876, or at any other time the said Ben Holladay, for a valuable consideration or otherwise made and entered into or made or entered into an agreement in writing as party of the first part with Henrich Hohenemser and others, known as the Frankfort Committee, then and there being the owners of \$10,255,100 of the first mortgage of said Oregon and California Railroad Company, by which said Holladay among other things covenanted and agreed for himself and his heirs and legal representatives that he would on demand either convey to the Oregon and California Railroad Company, or to the Oregon Central Railroad Company or to the Oregon Steamship Company or to the Portland Warehouse and Dock Company or to any or either of them, or else as the case might be, would take all necessary legal proceedings in conjunction with such companies or any of them for the purpose of compelling the transfer to said companies or any of them, any real estate or other property rights which equitably belonged to said companies or any of them, if any such property or rights there might be, but which might at that time be held by or stand in the name of said Holladay, or any other person or persons or corporations in trust, having been purchased for said corporations or conveyed to him for their use; and defendant expressly denies that the real property described in said bill of complaint ever was held by or stood in the name of

said Ben Holladay or any other person or persons or corporations in trust, having been purchased for said corporations or any or either of them or conveyed to him for their or either of their use; and defendant denies that said Ben Holladay ever was, or that this defendant is, bound or obligated by said alleged agreement, or otherwise, to execute any deed of further assurance or any deed of any kind or character to said Oregon and California Railroad Company of the real premises in said bill of complaint described.

18. Defendant further answering alleges that on or about the 22nd day of April, 1867, an attempt was made by one John H. Moores and seven others to form a corporation under the general incorporation laws of the State of Oregon, to be known as the Oregon Central Railroad Company; that said corporation so attempted to be formed is the same as alleged in said bill of complaint of that name, and articles of incorporation therefor were filed on said date with the Secretary of State of the State of Oregon; that the purposes and objects for which said corporation was attempted to be formed, as contained and set forth in said articles of incorporation was to construct a railroad with all the necessary branches, fixtures, buildings and appurtenances from Portland, in Oregon, southerly about three hundred miles to the California line, to maintain the said road in good condition and repair and to employ the same in the transportation of freight and passenger and freight, and defendant alleges that said corporation so attempted

to be formed was not by said articles of incorporation and under the laws of the said State of Oregon authorized or empowered to purchase, acquire, own or hold land or real estate other than such as might be necessary or convenient in the prosecution and carrying on of the enterprise occupation and business for which it was attempted to form said corporation; that the land and real property described in said bill of complaint and which it is therein alleged the said Ben Holladay conveyed or agreed to convey to said alleged corporation was not necessary or convenient for use thereby in the prosecution or carrying on of the said enterprise, occupation and business so contained in said articles of incorporation, and was not property which, or any part of which said alleged corporation was authorized or empowered by law to purchase, acquire, own or hold.

19. Defendant further answering says that the complainant's cause of action, against this defendant, if any it had, by reason of any of the matters or things alleged and contained in its said bill of complaint herein, is barred by the complainant's laches, and that the complainant's right or cause of action, or right to have any relief sought or prayed for in said bill of complaint by reason of any of the matters or things therein alleged or contained, if any it had, was at and before the bringing of complainants said bill and the commencement of this suit barred by the statute of limitations, of the State of Oregon, and that any and all cause or causes of action, if any, alleged or at-

tempted to be set forth in said bill of complaint accrued more than ten years prior to the commencement of this action.

20. Defendant further answering denies that the complainant, if it were entitled to any relief upon the matters and things set forth in its said bill of complaint, has not a plain adequate and complete remedy at law, and defendant alleges that if said complainant were entitled to any relief upon the matters and things charged and alleged in its said bill, it could have as plain and adequate and complete remedy at law as could be obtained in equity, and that this Honorable Court is therefore without jurisdiction in this suit.

WHEREFORE this defendant having fully answered confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered, according to her best knowledge and belief, humbly prays this Honorable Court to enter its judgment that this defendant be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as this Honorable Court may seem meet and in accordance with equity.

(Signed) MARIE de GRUBISSICH,

By Henry Conlin, her Attorney.

Defendant.

(Signed)

HENRY CONLIN and H. W. HOGUE,

Solicitor and Counsel for Defendant.

I hereby certify that the foregoing answer is, in my

opinion, well founded in point of law.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, A. M. Cannon, Clerk of the United States District Court for the District of Oregon do hereby certify that the foregoing copy of Answer to Bill of Complaint by way of Cross Bill, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland in said District this March 12, 1912.

A. M. CANNON,

Clerk.

By F. H. Drake, Deputy Clerk.

Filed Mar. 12, 1912.

A. M. CANNON,

Clerk U. S. Court.

[Defendant's Exhibit 2.]

Book "K" page 588,

Tibbetts & wife to Holladay ,Ben & Co.

KNOW ALL MEN BY THESE PRESENTS that we, Gideon Tibbetts & Mary his wife, in consideration of Six Hundred Dollars, lawful money of the United States, to us in hand paid by Ben Holladay & Co., of Portland, Multnomah County, Oregon, do grant, bargain, sell and convey and covenant to warrant and defend unto said Ben Holladay & Co., all that parcel

of land situated in Section Eleven (11) of the Gideon Tibbetts Donation claim, Multnomah County, State of Oregon, and described as follows: Beginning near a gateway thirty (30) feet west of the centre of the rail road track of the "Oregon Central R. R. (East side) and twenty (20) feet southerly from the South boundary of land deeded by G. Tibbetts to Yipsilanti Smith in 1859 running two hundred and ninety seven (297) feet Southerly to a stake thirty feet west from the centre of said railroad track, thence three hundred and thirty six feet (336) farther southerly to a stake, thirty feet west from the centre of said Railroad, track, thence three hundred and sixteen (316) feet farther Southerly to a stake thirty feet west from the centre of the Railroad track, thence two hundred feet (200) farther Southerly to a stake thirty feet from the centre of the Railroad track being eleven hundred and forty nine (1149) feet from the place of beginning to the last mentioned stake; thence One Hundred and eighty eight and four tenths ($188\frac{4}{10}$) feet West to a stake, thence ten hundred and ninety one (1091) feet northerly on a parallel with the Eastern boundary above described to a stake, thence one hundred and eighty eight and four-tenths ($188\frac{4}{10}$) feet East to the place of beginning, containing four acres more or less, and all our and each of our estate, right, title, interest and claim therein or thereto, whether at law or in equity, together with the appurtenances; Provided that we the said Gideon Tibbetts and Mary Tibbetts our heirs and assigns shall always reserve

the right to keep open, clean out, etc., a certain ditch running through the above described tract or parcel of land.

To have and to hold unto them the said Ben Holaday & Co. their heirs, and assigns forever.

In witness whereof we the said Gideon and Mary Tibbetts have hereunto set our hands and seals this 5 day of February, A. D., 1870.

Witness

Irving W. Pratt,
S. E. Josephi.

GIDEON TIBBETTS,
MARY TIBBETTS.

(U. S. R. S. \$1. Cancelled).

Interlined before signing on the tenth, fifteenth and seventeenth lines on the first page.

STATE OF OREGON,

County of Multnomah—ss.

On this 5th day of February, A. D. 1870, personally appeared before me the undersigned, a Notary Public, the within named Gideon Tibbetts and Mary his wife, known to me to be the persons described in and who executed the within instrument and acknowledged that they freely and voluntarily executed the same for the purpose therein set forth and Mary Tibbetts wife of Gideon Tibbetts on an examination made by me separately and apart from her said husband acknowledged to me that she executed the same freely and voluntarily and without fear or compulsion from any one.

March in the year of our Lord one thousand eight hundred and seventy six between Ben Holladay of Multnomah County and State of Oregon, and Esther, his wife, parties of the first part and The Oregon and California Rail Road Company, party of the second part, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of one dollars lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed and by these presents to remise, release and quit claim unto the said party of the second part, and to his successors and assigns forever. All and every the right, title, estate and interest of the said parties of the first part if any they have in or to all and every the lands and real estate situate in the County of Multnomah in said State of Oregon now in the actual occupation or possession of the said party of the second part under claim of title thereto and ownership in fee simple thereof.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. And the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, dower, right of dower, property possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part

of in or to the above described premises and every part and parcel thereof with the appurtenances.

To Have and To Hold all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

BEN HOLLADAY,
ESTHER HOLLADAY,

Sealed and delivered in the presence of:

George K. Otis,

Edwin F. Corey, Jr.

STATE OF NEW YORK,

City and County of New York—ss.

Be it remembered, that on this fourth day of March, in the year of our Lord one thousand eight hundred and seventy six, before me, Edwin F. Corey, Jr., a Notary Public of the State of New York duly commissioned and sworn and dwelling in said City and County, personally came Ben Holladay and Esther his wife, personally to me known to be the individuals described in, and who executed the within conveyance who severally acknowledged that they executed the same as their free act and deed for the uses and purposes therein expressed. And the said Esther, wife of the said Ben Holladay, further acknowledged in a private examination by me made separate and apart from her said husband, that she executed the same

freely and without any fear or compulsion of or from her said husband.

In Witness Whereof, I have hereunto set my hand and official notarial seal, the day and year aforesaid.

[Notarial Seal.] EDWIN F. COREY, JR.,

Notary Public State of New York.

STATE OF NEW YORK,

City and County of New York—ss.

I, William Walsh, Clerk of the City and County of New York and also Clerk of the Supreme Court for the said City and County, the same being a court of record, do hereby certify that Edwin F. Corey, Jr., whose name is subscribed to the certificate of the proof of acknowledgement of the annexed instrument and therein written, was, at the time of taking such proof or acknowledgement a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the hand writing of such Notary and verily believe that the signature to the said certificate of proof or acknowledgement is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 6 day of March, 1876.

[Seal of the Court.]

WM. WALSH,

Clerk.

Recd. for record at 4 o'clock P. M., April 15, A. D.,
1876.

STATE OF OREGON,

County of Multnomah—ss.

I, F. S. Fields, County Clerk and Clerk of the County Court of the County of Multnomah and State of Oregon, do hereby certify that the foregoing copy of Deed, Ben Holladay and wife to The Oregon and California Rail Road Company recorded in Book 29 page 131, Record of Deeds, has been compared by me with the original, and that it is a correct transcript therefrom, and of the whole of such original Deed as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 24th day of Oct. A. D., 1911.

F. S. FIELDS,
County Clerk.

Filed Feb. 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 20th day of July, 1912, there was duly filed in said Court Petition for Appeal in words and figures as follows to wit:

No. 3745.

[Petition for Appeal]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.
OREGON AND CALIFORNIA RAILROAD COMPANY,

a corporation,

vs.

MARIE DE GRUBISSICH, nee Marie de Pourtales,
Defendant.

The complainant conceiving itself aggrieved by the decree made and entered herein on the ninth day of July, 1912, giving judgment for defendant and dismissing the bill of complaint of complainant, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and files herewith its assignment of errors and intended to be urged on appeal.

The complainant prays an order of this Court staying all further proceedings upon the said decree pending this appeal, upon its giving a good and sufficient bond to be approved by this Court, that a proper citation may be issued and served upon the said defendant or her attorneys herein, and that a transcript of the record, papers and proceedings, together with the testimony, including all exhibits, upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

A. P. DOBSON,
KENNETH L. FENTON,
BEN C. DEY, and
WM. D. FENTON,

Solicitors and Attorneys for Complainant.

DISTRICT OF OREGON,

County of Multnomah,—ss.

Due service of the within petition on appeal is hereby

accepted in Multnomah County, Oregon, this 20 day of July, 1912, by receiving a copy thereof duly certified to as such by Alfred P. Dobson, of attorneys for plaintiff.

HENRY CONLIN,

By Walter S. Asher,

Attorneys for Defendant.

(Endorsed) Filed July 20, 1912.

A. M. Cannon, Clerk U. S. District Court.

And afterwards, to-wit, on the 20 day of July, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

In the DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

No. 3745.

(Assignment of Errors.)

OREGON AND CALIFORNIA RAILROAD COMPANY,
a corporation,

Complainant,

vs.

MARIE DE GRUBISSICH, nee Marie de Pourtales,

Defendant.

In connection with its petition for allowance of appeal herein, the complainant makes and files this assignment of errors made by the Court in its decree entered herein on July 9, 1912, as follows:

I.

Said Court erred in holding, adjudging or decreeing that the bill of complaint and complainant's suit herein should be dismissed and that the defendant should have

and recover of and from the complainant her costs and disbursements.

II.

Said Court erred in holding, adjudging or decreeing that the allegations of the bill of complaint were not proven, and particularly in holding, adjudging or decreeing that the complainant had failed to prove the alleged agreement of March 28, 1870, purporting to be signed by Ben Holliday, C. Temple Emmet and Ben Holiday & Company, set out and described in bill of complaint.

III.

Said Court erred in holding, adjudging or decreeing that the said agreement of March 28, 1870, so purporting to be signed as aforesaid, did not operate as a contract for a conveyance of Lots 5 and 6 of Section 29, and the North Half of the Northeast Quarter of Section 32, Township 1 South, Range 2 East of the Willamette Meridian, in Clackamas County, Oregon, to the Oregon Central Railroad Company.

IV.

Said Court erred in holding, adjudging or decreeing that the complainant is not now the owner in fee simple and in possession of said lands and entitled to the possession thereof against the defendant and all other persons claiming the same by, through or under the said Ben Holliday and Company, said C. Temple Emmet or Ben Holliday, or either thereof.

V.

Said Court erred in holding, adjudging or decreeing

that the complainant was not entitled to a decree against the defendant specifically enforcing said agreement of March 28, 1870, and in quieting the title to the complainant to the said premises as aforesaid.

VI.

Said Court erred in not holding, adjudging and decreeing that in reliance upon the said agreement of March 28, 1870, and the said deed of March 29, 1870, executed by the Oregon Central Railroad Company to the Oregon and California Railroad Company, complainant herein had gone into immediate possession of said lands and the whole thereof, and has been in the actual, open, notorious and adverse possession thereof under claim of title since said March 29, 1870, and continuously for a period of more than thirty years, and in not holding, adjudging and decreeing that the defendant herein was barred by the statute of limitations of the State of Oregon.

VII.

Said Court erred in not holding, adjudging and decreeing that the claim of defendant to the said lands or any part thereof is stale, and in not holding, adjudging and decreeing that Ben Holliday was estopped to deny the execution of said agreement of March 28, 1870, and was estopped to deny as to the complainant the transfer and agreement to convey said property to the Oregon Central Railroad Company, and its transfer to the Oregon and California Railroad Company by the Oregon Central Railroad Company, and in not holding, adjudging and decreeing that the defendant was bound by or es-

topped by the acts, acquiescence and omissions of the said Ben Holliday in reference to said premises, and in not holding, adjudging and decreeing that the defendant was barred by her laches and by said estoppel from asserting any claim to said premises or any part thereof.

VIII.

Said Court erred in not holding, adjudging and decreeing that the allegations of the complainant's bill of complaint were supported by the evidence, and in not holding, adjudging and decreeing that the complainant was entitled to a decree perpetually enjoining and restraining the defendant from prosecuting the said action at law described in the bill of complaint, whereby the said defendant in said action at law was seeking to recover the possession of the said real property, and in not granting a perpetual injunction against the further prosecution of said action in ejectment for the recovery of said land, and in not entering a decree for the complainant as prayed for in the bill of complaint, and for the costs and disbursements of this suit.

WHEREFORE, the complainant prays that the said decree herein be reversed and that this Court enter a decree as prayed for in complainant's bill of complaint, and for such relief as shall appertain to a court of equity.

A. P. DOBSON,

KENNETH L. FENTON,

BEN C. DEY, and

WM. D. FENTON,

Solicitors and Attorneys for Complainant.

DISTRICT OF OREGON,

County of Multnomah,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, this 20 day of July, 1912, by receiving a copy thereof, duly certified to as such by Alfred P. Dobson, of attorneys for plaintiff.

HENRY CONLIN,

By Walter S. Asher,

Attorneys for Defendant.

(Endorsed). Assignment of Errors. Filed July 20, 1912,
A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on Thursday, the 25th day of July, 1912, the same being the 21st judicial day of the regular July, 1912, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

(Order Allowing Appeal)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

OREGON AND CALIFORNIA RAILROAD COMPANY,
a corporation,

Complainant,

vs.

MARIE DE GRUBISSICH, nee Marie de Pourtales,

Defendant.

Having considered the complainant's petition for allowance of appeal and supersedeas from the decree made and entered herein on July 9, 1912, together with the assignment of errors, on motion of Wm. D. Fenton and Alfred

P. Dobson of solicitors for complainant, the appeal of the complainant is allwed as prayed upon giving a bond in the sum of one thousand dollars (\$1000.00), to be approved by this Court, which bond shall operate as a supersedeas from the date of its approval, and shall operate to stay the further prosecution of said action at law in this Court until the determination of said cause on appeal.

Made and entered on July 25, 1912.

CHAS. E. WOLVERTON,

Judge.

(Endorsed) Order. Filed July 25, 1912.

A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 1st day of August, 1912, there was duly filed in said Court a Bond on Appeal in words and figures as follows, to wit:

(Bond on Appeal)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF OREGON.

OREGON AND CALIFORNIA RAILROAD

COMPANY, a corporation,

Complainant,

vs.

MARIE DE GRUBISSICH, nee Marie de Pourtales,

Defendant.

KNOW ALL MEN BY THESE PRESENTS, that the OREGON AND CALIFORNIA RAILROAD COMPANY, and D. W. Campbell as surety, each of Portland, Oregon, are held and firmly bound unto Marie de Grubissich, the defendant herein, in the sum of one thousand dollars (\$1000.00) to be paid unto the said defendant, for

the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Oregon and California Railroad Company, complainant above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and supersedeas from the decree entered in the above entitled suit on July 9, 1912, and the condition of this obligation is, that if the said Oregon and California Railroad Company shall prosecute its appeal to effect and answer the costs taxed in the decree appealed from, together with all damages, interest and costs of such appeal and supersedeas if the complainant fails to make its said appeal good, then this obligation to be void, otherwise to remain in full force.

Dated and signed July 22, 1912.

OREGON AND CALIFORNIA RAILROAD COMPANY,

By D. W. Campbell, its 2nd Vice-President.

OREGON AND CALIFORNIA RAILROAD COMPANY,

By Wm. D. Fenton, its Secretary.

D. W. Campbell, Surety.

STATE OF OREGON,

County of Multnomah.—ss.

I, D. W. Campbell, being first duly sworn say: I am surety on the foregoing bond, I am a resident of and free holder within the State and District of Oregon, and I am worth the sum of one thousand dollars (\$1000.00) over and above all my just debts and liabilities in property situated in said District, exclusive of property exempt

from execution.

D. W. CAMPBELL.

Subscribed and sworn to before me this 22nd day of July, 1912. .

BEN C. DEY,

Notary Public in and for the State of Oregon.

(Endorsed) Bond on Appeal. Filed Aug. 1, 1912.

A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on the 2d day of August, 1912, there was duly filed in said Court, a Citation on Appeal in words and figures as follows to wit:

(Citation on Appeal)

UNITED STATES OF AMERICA,

District of Oregon.—ss.

To Henry Conlin, H. W. Hogue, attorneys for Maria de Grubissich, greeting:

Whereas, The Oregon & California Railroad Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 1st day of August, in the year of our Lord, one thousand,

nine hundred and twelve.

R. S. BEAN,
Judge.

STATE OF OREGON,

County of Multnomah.—ss.

Due and legal service in said county and state of a copy of the within original citation is hereby accepted.

Dated this 1st day of August, 1912.

H. W. HOGUE,
Of Attorneys for Defendant.

(Endorsed) Citation on Appeal. Filed Aug. 2, 1912.

A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on Wednesday, the 28th day of August, 1912, the same being the 50th judicial day of the regular July, 1912, term of said court; present, the Honorable Chas. E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

(Order Enlarging Time to File Transcript.)

No. 3745.

August 28, 1912.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

OREGON AND CALIFORNIA RAILROAD COMPANY,
a corporation,

Complainant,

vs.

MARIE DE GRUBISSICH, nee Marie de Pourtales,

Defendant.

Now, at this day, for good cause shown, it is ordered

that the plaintiff's time for printing the record and filing and docketing this cause on appeal to the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended ten days from this date.

CHAS. E. WOLVERTON,

Judge.

And afterwards, to wit, on Wednesday, the 28 day of August, 1912, the same being the 50 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Certifying Up Original Exhibits.]

In the District Court of the United States

For the District of Oregon

OREGON & CALIFORNIA RAILROAD COMPANY, a corporation,

Complainant,

vs.

MARIA de GRUBISSICH,

Defendant.

No. 3745.

August 28, 1912.

It appearing to the court that certain of the exhibits introduced in evidence on the trial of this cause in this court should be sent to the United States Circuit Court of Appeals, Ninth Circuit, for its inspection on the appeal of this cause;

It is ordered that complaint's original exhibits 1, 2, 3, 4, 5, 18, 62, 63, 64, 65, 66 and 67 be sent up by the clerk of this court with the printed transcript to the said court of appeals.

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

OREGON & CALIFORNIA RAIL-
ROAD COMPANY, a corporation,
Complainant-Appellant,

VS.

MARIA DE GRUBISSICH, NEE
MARIA DE POURTALES,
Defendant-Appellee.

2181

Appeal from the District Court of the United States, for
the District of Oregon.

WM. D. FENTON,
KENNETH L. FENTON,
BEN C. DEY,
ALFRED P. DOBSON,

Attorneys for Complainant-Appellant.

HENRY CONLIN,
H. A. HOGUE,

Attorneys for Defendant-Appellee.

FILED
SEP 30 1912

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

OREGON & CALIFORNIA RAIL-
ROAD COMPANY, a corporation,
Complainant-Appellant,

VS.

MARIA DE GRUBISSICH, NEE
MARIA DE POURTALES,
Defendant-Appellee.

BRIEF FOR COMPLAINANT--APPELLANT

STATEMENT OF FACTS.

This suit involves the legal title to certain real property situated in Clackamas County, State of Oregon, and more particularly described as follows, to-wit:

The East Half of the Southeast Quarter, and Lots five and six of Section twenty-nine, and the North Half of the Northeast Quarter of Section thirty-two, Township one South of Range two east of the Willamette Meridian.

On or about the 22nd day of April, A. D. 1867, a corporation was organized under the general incorporation laws of the State of Oregon, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Oregon, southward to the California State line.

On or about the same date, the said corporation entered into an agreement with one S. G. Elliott, who was acting for A. J. Cook, whereby S. G. Elliott and A. J. Cook were to construct its first one hundred and fifty miles of railroad. This contract was supplemented and modified thereafter by another contract of date November 27, 1867, and at this time a co-partnership was formed by S. G. Elliott and A. J. Cook under the name of A. J. Cook and Company. That the firm of A. J. Cook and Company, by and through S. G. Elliott, contracted with the Oregon Central Railroad Company for the completion of its road from the terminus of the first one hundred and fifty miles to the California state line. Construction work under this contract, breaking ground, etc., was commenced on or about the 17th day of April, 1868, by S. G. Elliott for and on behalf of A. J. Cook and Company, and was continued by S. G. Elliott and A. J. Cook and Company until on or about the 15th day of September, 1868, when all contracts entered into by and between A. J. Cook and Company and the Oregon Central Railroad Company for the building of its railroad were assumed by consent of all

parties thereto, by a co-partnership styled Ben Holladay and Company and which had theretofore been formed for the express purpose of constructing, owning and operating railroads.

The firm of Ben Holladay and Company was composed of Ben Holladay, S. G. Elliott and C. Temple Emmet.

The primary purpose for which the co-partnership of Ben Holladay and Company was formed, was to complete the work of constructing the railroad for the Oregon Central Railroad Company which had been commenced by A. J. Cook and Company.

Soon after assuming the contract entered into between the Oregon Central Railroad Company and A. J. Cook and Company, and on or about the 19th day of November, 1868, the firm of Ben Holladay and Company purchased from William Showers and James Grindley all of the timber on the lands above described, and thereafter and before removing the timber, purchased the said lands, including the timber, securing a deed of date May 4, 1869, from James Grindley for the East Half of the Southeast Quarter and lots numbered five and six of section twenty-nine, township one south, range two east of the Willamette Meridian, and thereafter another deed of date October 5th, 1869, from Gardner Elliott and wife for the North Half of the Northeast Quarter of section thirty-two, township one south, range two east of the Willamette Meridian. At the time the firm of Ben Holladay and

Company purchased the timber on the above described lands, and the right to erect mill sites thereon, the legal title was still vested in the United States. Patents were not issued until on or about the dates the deeds were executed, to wit, the 4th day of May, 1869, and October 5th, 1869 thereafter. The lands so acquired were covered with a heavy growth of fir timber suitable for ties, bridge timbers, etc., necessary and indispensable for railroad construction, and said lands were so situated with reference to the railroad as to be very convenient for the location of the necessary saw mills for manufacturing the timber thereon into ties, etc. All of the timber on the lands above described was manufactured into ties, bridge timbers, etc., and was used in constructing the first twenty miles of railroad, which was the only part of the work undertaken by the firm of A. J. Cook and Company under their contract with the Oregon Central Railroad Company and which contract was assumed by the firm of Ben Holladay and Company, that was done by Ben Holladay and Company, notwithstanding that Ben Holladay and Company were to completely perform the contract by building the road to the California state line.

On or about the 15th day of September, 1869, prior to the completion of the first twenty miles of road, the firm of Ben Holladay and Company abandoned the contract entered into by and between A. J. Cook and Company and the Oregon Central Railroad Company and which was assumed

by Ben Holladay and Company, to build the road to the California state line, and with the consent of the Oregon Central Railroad Company and on said date, a new agreement was entered into whereby Ben Holladay and Company were released from all obligations and undertakings by reason of their having assumed the said A. J. Cook and Company contract. As a part of this agreement, the Oregon Central Railroad Company was required to assign and set over unto the firm of Ben Holladay and Company all of its outstanding stock, bonds, franchises and other property of every kind or nature, as security for the payment of all sums of money which had been expended and which might thereafter be expended by the firm of Ben Holladay and Company in building said twenty miles of railroad south of the City of Portland.

At the time this agreement of September 15, 1869 was made, the Oregon Central Railroad Company was having considerable difficulty in selling its bond issue owing to an attack being made upon its right to the use of the name of Oregon Central Railroad Company, another company having theretofore adopted the same name. It was also being attacked upon the ground that it was not a legally organized corporate body.

By this agreement of September 15, 1869, the Oregon Central Railroad Company virtually became the property of Ben Holladay and Company, and its destinies were in the care and keeping of the firm of Ben Holladay and Company, which was

a co-partnership dominated and controlled by Ben Holladay.

On or about the 5th day of November, 1869, Ben Holladay caused to be instituted a suit for the dissolution of the firm of Ben Holladay and Company, in which he and one C. Temple Emmet were plaintiffs, and S. G. Elliott and others were defendants.

Thereafter, towit, on or about the 25th day of December, 1869, and prior to the determination of the dissolution suit above mentioned, the firm of Ben Holladay and Company completed the first twenty miles of railroad for the Oregon Central Railroad Company, which was by the terms of an act of Congress dated July 25, 1866, the time within which the first twenty miles was to be completed as a condition precedent to acquiring the lands granted by this act, which was an act in aid of the construction of a railroad "from the Central Pacific Railroad in California, to Portland, in Oregon," and thereafter, towit, on or about the 28th day of March, 1870, an agreement was executed by Ben Holladay, C. Temple Emmet by Ben Holladay attorney in fact, as individuals, and by Ben Holladay and Company by Ben Holladay, wherein Ben Holladay and Company agreed for a good and valuable consideration, to transfer and deliver various and sundry articles of personal property enumerated in said agreement unto the Oregon Central Railroad Company, and in addition thereto specifically agreed to transfer and convey all leases and real property now owned or possessed by them in the State of Oregon, stating

that all of this property was located principally in the counties of Multnomah and Clackamas in said state.

On the same date that this agreement was executed and delivered, a proposition was submitted to the president of the board of directors of the Oregon Central Railroad Company by Ben Holladay as president of the Oregon and California Railroad Company, which proposition was in the form of a resolution passed by the board of directors of the Oregon and California Railroad Company on the 26th day of March, 1870, and which in substance was an offer upon the part of the Oregon and California Railroad Company to purchase the franchise of the Oregon Central Railroad Company, and in addition thereto all of its real property and personal property of every kind and nature wherever situated. The consideration to be paid for such property was simply the promise and undertaking on the part of the Oregon and California Railroad Company to assume and pay all the debts and liabilities of the Oregon Central Railroad Company and to indemnify and forever keep harmless the Oregon Central Railroad Company from any and all such payments and from all liability whatsoever of every name and nature, for which the Oregon Central Railroad Company might be liable at the date of the acceptance of the said proposition. The principal indebtedness of the Oregon Central Railroad Company at this time was its indebtedness to the firm of Ben Holladay and Company in the sum of about eight hundred

thousand dollars (\$800,000.00) for the construction of the first twenty miles of road.

This proposition was accepted by the Oregon Central Railroad Company on the same day (March 28, 1870) and an agreement for the sale of all of the property of every kind and nature of the Oregon Central Railroad Company was executed immediately thereafter and on the same date, and in pursuance of a call for a special meeting of the stockholders of the Oregon Central Railroad Company issued by authority of a resolution passed by the board of directors of the Oregon Central Railroad Company on the 14th day of March, 1870, prior thereto, and called for the purpose of authorizing a dissolution of the Oregon Central Railroad Company, a special meeting was held. At this meeting it was decided by a majority vote of all the stockholders present, that the Oregon Central Railroad Company as a corporation should be dissolved.

At the time of the dissolution of the Oregon Central Railroad Company it appears that *Ben Holladay and Company* was the owner of all but eleven shares of the capital stock of the Oregon Central Railroad Company.

The 28th day of March, 1870, is to be remembered as an eventful day in the history of this controversy for the reason that three events took place upon this date which have considerable bearing upon the issues in this suit, as it was upon this date that the agreement to convey the real property

in dispute here to the Oregon Central Railroad Company was executed—the purchase by the Oregon and California Railroad Company of the Oregon and Central Railroad Company, which carried with it the lands involved here, and the dissolution and death of Oregon Central Railroad Company, which was owned and controlled by Ben Holladay and Company, and which was resurrected and given new life by Ben Holladay under the title of Oregon and California Railroad Company, a corporation organized, controlled and dominated by Ben Holladay personally.

The Oregon and California Railroad Company went into possession of all the property acquired from the Oregon Central Railroad Company on or about the 29th day of March, 1870, of which the lands in controversy here were a part. The dissolution suit commenced by Ben Holladay and C. Temple Emmet against S. G. Elliott et al., on or about the 5th day of November, 1869, was still pending, and during the time intervening between the said 5th day of November, 1869, and the 15th day of August, 1879, the date upon which the issues therein were finally determined, the deposition of Ben Holladay was taken on two occasions, first, on the 27th day of December, 1870, and the second on the 3rd day of April, 1871. Upon testifying on the 27th day of December, 1870, Ben Holladay was asked to make a statement as to what property he had acquired since the 12th day of September, 1868, and in making a statement

as to what property he had acquired since that date no mention or reference was made to the lands above described and which are the subject of this controversy. On April 3, 1871, thereafter, in answer to a question as to what property the company, Ben Holladay and Company, owned on the date the dissolution suit was commenced, Ben Holladay failed to mention the lands herein.

The issues framed in said dissolution suit were, however, finally determined by the Supreme Court of the State of Oregon on the 7th day of July, 1879, and in the findings no mention or reference was made to the said lands, notwithstanding the fact that the relative rights of the parties thereto were determined after the examination of the records from the court below, which included the depositions above referred to.

Prior to the determination of the dissolution suit above referred to, which was commenced on November 5, 1869, another suit was instituted by John Nightingale and S. G. Elliott as complainants against the Oregon Central Railroad Company and the Oregon and California Railroad Company as defendants. This suit was commenced some time prior to the 5th day of October, 1873, and an amended bill of complaint was filed on August 11, 1873. This suit was for the purpose of recovering whatever interest the said S. G. Elliott and John Nightingale had in the Oregon Central Railroad Company which, as they claimed, had been absorbed and swallowed up by the Oregon and California

Railroad Company by and through the fraudulent schemes and machinations of Ben Holladay in a general sale made to the Oregon and California Railroad Company of all of the property of every kind and nature of the Oregon Central Railroad Company; that the sale and absorption of the Oregon Central Railroad Company was in effect the work of Ben Holladay, who dominated and controlled the affairs of both companies.

The interest of S. G. Elliott in the Oregon Central Railroad Company and which he was endeavoring to recover in the suit entitled, John Nightingale, et al., vs. Oregon Central Railroad Company et al., was an interest acquired by virtue of his interest in and connection with the A. J. Cook and Company, which was later taken over and succeeded by the firm of Ben Holladay and Company, the latter firm, prior to the institution of said suit, towit, on the 28th day of March, 1870, having made a general sale of all its assets of every kind unto the Oregon Central Railroad Company.

The Oregon Central Railroad Company and the Oregon and California Railroad Company answered to the bill of complaint and in said answer all transactions leading up to the purchase of the Oregon Central Railroad Company were set out and rehearsed and special consideration was given to the said agreement of March 28, 1870, the same being made a part of the defendants' answer to said bill of complaint, cross bill by attaching a copy thereto. The defendants by setting up this

agreement in their answer, were endeavoring to show that any rights the complainant S. G. Elliott had in the firm of Ben Holladay and Company were determined in so far as the Oregon Central Railroad Company was concerned, by this agreement of March 28, 1870, and that there was a good and sufficient consideration paid unto S. G. Elliott by the firm of Ben Holladay and Company for whatever interest S. G. Elliott may have had in the property so conveyed to the Oregon Central Railroad Company at that time. This amended answer was verified by the Oregon and California Railroad Company by Ben Holladay as president and by A. G. Cunningham as secretary.

In the same suit and soon after the filing of the original bill of complaint, towit, on the 22nd day of June, 1871, Ben Holladay signed an affidavit before Ralph Wilcox, Clerk of the court wherein said suit was pending, setting forth that he was a director and one of the principal stockholders in the Oregon and California Railroad Company, and in addition thereto made numerous denials and allegations to and concerning the matters and things set forth in complainant's bill of complaint, and on page 4 of said affidavit refers to the proceedings of March 28, 1870, showing that he had knowledge of and relied upon the agreement of March 28, 1870, which had been executed by himself and other members of the firm of Ben Holladay and Company.

Following the incidents just referred to, on or

about the 29th day of February, 1876, an agreement was entered into between Ben Holladay and the holders of ten million dollars worth of the bonds of the Oregon and California Railroad Company, said agreement being signed by Ben Holladay by H. Hampton, his attorney in fact, and Henry Villard, attorney in fact for the bondholders, which agreement will be referred to hereinafter as the Frankfort Committee agreement. By the terms of this agreement Ben Holladay was to sell and transfer unto the Frankfort Committee nineteen million dollars of the capital stock of the Oregon and California Railroad Company, being all of the legally issued stock of the said company, excepting only one million dollars held by M. S. Latham and others.

In clause nine of this agreement there was a provision in substance to the effect that Ben Holladay would, in the event that it should ever appear that there was any property which equitably belonged to the Oregon Central Railroad Company or to its successor, the Oregon and California Railroad Company, standing in the name of Ben Holladay, or held in the name or possession of any other person or persons, or corporations, in trust, that the said Ben Holladay for himself, his heirs and legal representatives, would, on demand, convey to the Oregon and California Railroad Company any such property, or take such legal proceedings as may be necessary in conjunction with said company or companies to perfect the title thereto

in the said Oregon and California Railroad Company.

Prior to the execution of this agreement, towit, on the 27th day of September, 1875, Ben Holladay made a will, making special disposition of all his estate, but made no reference to the lands in controversy here. In this will he made a number of specific bequests and after so doing gave all the rest and residue of his estate unto Maria de Grubissich, the defendant herein. The defendant in this suit claims to hold the legal title to the lands in dispute under and by virtue of this residuary clause in said last will and testament of Ben Holladay, deceased.

That after the making of said will and prior to the death of Ben Holladay and the probate of his will, there was born to Ben Holladay and Esther Holladay, his wife, one daughter, named Linda Holladay, now Linda H. Dorcy, and one son, named Benjamin C. Holladay, and as to the said Linda H. Dorcy and Benjamin C. Holladay there was an intestacy.

The will of Ben Holladay, deceased, was duly admitted to probate on the 11th day of October, 1887, by the County Court of Multnomah County, and the said estate was administered and forever settled and the administrator, Joseph Holladay, brother of Ben Holladay, deceased, was discharged September 10, 1900.

The probate proceedings show that the estate of

Ben Holladay was appraised and that in the list of property furnished by the administrator and the appraisers of said estate, the lands above described and which are in controversy here were not listed nor mentioned.

That at the time this estate was administered and settled, the defendant Maria de Grubissich was about sixteen years of age, and Linda Holladay, now Linda H. Dorcy, years of age, and Benjamin C. Holladay twelve (12) years of age.

The defendant Maria de Grubissich is now a resident of Tunis, Africa, and has so resided during the past fifty years and is a subject of the Emperor of Austria, and has not resided in the State of Oregon, or the United States, since the death of Ben Holladay in July, 1887.

There is no evidence in the record to the effect that defendant, or any one representing her, has made any claim to the above described lands since the settling of the estate of Ben Holladay, or any other person connected with or having to do with the estate of Ben Holladay since his death and the probate of his estate, or prior to his death, to these lands, nor is there any evidence of any acts of ownership by any of said heirs or representatives of said Ben Holladay, deceased.

The complainant herein has been in peaceable possession of these lands since March 28, 1870, and has paid the taxes thereon since 1873, excepting

the year 1877, when for some reason these lands were not assessed.

The complainant was not aware that any one else claimed the legal title to these lands until it was served with summons and copy of complaint in the ejectment action commenced by the defendant above named, on or about the 11th day of March, 1911. These lands have been claimed by the Oregon and California Railroad Company since the 28th day of March, 1870, and since said date has continually asserted its ownership to said lands by various acts and deeds which will be hereinafter more particularly referred to.

STATEMENT OF ISSUES.

Complainant claims to have introduced sufficient evidence herein to establish affirmatively the following propositions:

I.

That on the 28th day of March, 1870, an agreement was executed by Ben Holladay, C. Temple Emmet and by Ben Holladay and Company, a co-partnership, and on the same date delivered unto the Oregon Central Railroad Company, wherein it was agreed to convey unto the Oregon Central Railroad Company the lands in dispute in this suit.

II.

That the original of this agreement is not now in existence, but that it has been lost or destroyed

and that in all probability was destroyed in the fire and great conflagration which occurred in San Francisco on the 18th day of April, 1906.

III.

That a true copy of the original of this agreement appears in the minute book of the Oregon Central Railroad Company on pages 175 and 176, which was introduced in evidence herein and marked "Complainant's Exhibit 7".

IV.

That another copy of this same agreement is a matter of record in a certain suit entitled John Nightingale and S. G. Elliott, complainants, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, defendants, which was commenced in the Circuit Court of the United States for the Ninth Circuit, District of Oregon, some time prior to October, 1873.

V.

That at the time the said agreement of March 28, 1870, was executed by Ben Holladay and others, it was the intention of the parties thereto to agree to convey unto the Oregon Central Railroad Company the lands hereinbefore described and which are the subject of this controversy, and was a bona fide attempt so to do.

VI.

That the complainant has been in continuous,

open and notorious, exclusive and adverse possession of the said lands under claim of title adversely to the defendant since the 29th day of March, 1870, and has paid the taxes thereon since the year 1873 to 1910, inclusive, except the year 1877, when no assessment was levied on these lands.

VII.

That the defendant and her predecessors in interest and all others claiming title by virtue of the residuary clause of the last will and testament of Ben Holladay, deceased, have disclaimed all interest in and to the lands in dispute and have long since been and are now barred by the statute of limitations and by laches from successfully asserting any claim of title to the said lands, and that it will be *presumed* that the instrument of March 28, 1870, or some other conveyance to these lands, was duly executed by the firm of Ben Holladay & Co. and Ben Holladay.

VIII.

That the two parcels of land hereinbefore described and which are the subject of this controversy, were purchased from James Grindley and Gardner Elliott by Ben Holladay and Company, a co-partnership, for the purpose of securing the timber thereon and for locations for saw mills to manufacture said timber into ties, etc., in building a railroad for the Oregon Central Railroad Company, and that said lands were purchased primarily for the use and benefit of said Company.

IX.

That by a written agreement Ben Holladay, C. Temple Emmet and the firm of Ben Holladay and Company, a co-partnership on or about the 28th day of March, 1870, agreed to convey unto the Oregon Central Railroad Company for a good and valuable consideration, all of their right, title and interest in and to the following described real property, towit:

The East Half of the Southeast Quarter, and lots five and six of section twenty-nine, and the North Half of the Northeast Quarter of section thirty-two, township one south of range two east of the Willamette Meridian, and that on said date the Oregon Central Railroad Company duly conveyed said premises to the Oregon & California Railroad Company, and that ever since said date the last named company has been in the actual open, notorious and adverse possession thereof, under color and claim of title thereby deraigned.

STATEMENT OF POINTS AND AUTHORITIES

I.

Where there appears upon the pages of a minute book of a corporation a copy of an agreement, such minute book may be introduced in evidence to prove the existence, execution, delivery and contents of the original, where from the evidence it appears:

(a) That the original of the copy set out in such minute book has been lost or destroyed and is not now in existence, and this is sufficiently proven when it appears:

1st. That a reasonably diligent search has been made to find the original of said alleged copy, and that such search has failed to produce the original.

Wigmore on Evidence, Sec. 1193 to 1198,
Vol. 2,

Elliott on Evidence, Sec. 1451 et seq., Vol.
2,

Jones on Evidence, Sec. 216, Pocket Edition,

Elliott on Evidence, Sec. 1459, Vol. 2.

2nd. A sufficient search has been shown where it appears:

(a) That the proper persons in whose custody such agreement would most likely be found, have searched or caused a search to be made through their files, vaults, etc., wherein agreements and papers of the same character are usually kept and such search has been without result.

Minor v. Tillotson, 7 Peters (U. S.) 99

Winchester v. Aiken, 31 Fed. 393

Smith v. Cox, 9 Or. 327

Williams v. Northern Pac. Ry. Co., 20 Or.
425

Greenleaf on Evidence, Sec. 558, Vol. 1

Elliott on Evidence, Sec. 1459-61, Vol. 2

Wigmore on Evidence, Sec. 1194, Vol. 2,
2nd paragraph.

(b) That the minute book wherein the alleged copy is set out has been properly introduced, and this has been done where it appears from the evidence.

1st. That it was produced from the proper custody of one whose duty it is to take care of and look after such books and records and that such person came into possession of such book from his predecessor, who was a proper person to have the custody of such book.

Elliott on Evidence, Sec. 1330 et seq., Vol. 2

Thompson on Corporations, Sec. 1852, Vol. 2

Morgan v. Hutt, 113 S. W. 958

Milner v. Phelps, 115 S. W. 891

2nd. That the person or persons who made such entries and records are not now living, but whose handwriting and signatures appearing in such books have been recognized by persons who knew them and were familiar with their handwriting and testified that they were the persons whose duty it was to make such entries and that they knew that the minute book constituted the records of a certain corporation which had been relied and acted upon as such for a number of years.

Owings v. Speed, 5 Wheaton 520

Union Gold Mining Co. v. N. B., 2 Colo.,
565

Chenango Bridge Co. v. Lewis, 63 Barb. (N.
Y.) 111

Union Bank v. Knapp, 20 Mass., 96

Thompson on Corporations, Sec. 1852, Vol. 2 (2nd Ed.)

(c) That the minute book of a corporation which contains entries and records therein more than thirty years old, is admissible in evidence to prove the existence, execution, delivery and contents of certain writings which were copied therein, where it appears:

1st. That it contains entries of various transactions and preliminary negotiations leading up to the execution of an agreement of which a copy is therein set out, which from their very nature would furnish strong argument in favor of their own verity.

Attorney General v. Boulton, 2 Ves. Jr., 380

Goodman v. Jack, 62 Mo., 416

2nd. That entries and memoranda made therein were made in the regular and due course of business by one who is not now living and whose duty it was to keep such record and who had no personal interest in misstating the facts therein recorded, and that no evidence has been introduced to show that they were made for fraudulent purposes or in anticipation of the present litigation.

Lasson v. Boston & Lowell R. R. Co., 60 N. H., 315

Wheeler v. Walker, 45 N. H., 358-59; see cases cited p. 359

Welch v. Barrett, 15 Mass., 385

Elliott on Evidence, Sec. 481, Vol. 1

3rd. That from the very necessities of the case it is imperative that such minute book be admitted, it being the best evidence that is pos-

sible of being produced in order that the Court may safely determine whether or not the complainant is to prevail in this suit.

Welch v. Barrett, 15 Mass., 383-4

Thomas v. Thomas, 1 La., 166-68

Dodge et al. v. Gallatin, 130 N. Y. 133

Wigmore on Evidence, Sec. 1192, Vol. 2

Elliott on Evidence, Sec. 481, Vol. 1

Ency. of U. S. Sup. St. Repts., Vol. 3, p. 2145.

II.

It is not necessary to the competency of a pleading as an admission against a party that it be one filed in an action between the same parties. A pleading filed in any action is competent against a party if he signed it, or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence open to rebuttal that he admitted such facts.

Wharton on Evidence, Sec. 838, Vol. 1

Greenleaf on Evidence, Sec. 195, Vol. 1

Ency. of Evidence, p. 425, Vol. 1, and cases cited.

(a) Pleadings verified by a party, or drawn under his special instructions and which raise an issue of fact, are admissible in evidence against him in other cases, whether between the same parties or not.

Jones Electric Co. v. Jonathan Clark & Sons,
108 Fed. 170

Royalls, Administrator v. McKenzie et al, 81 Ala. 364

Pope v. Allis, 115 U. S. 368-69

Elliott on Evidence, Sec. 237, Vol. 1

Greenleaf on Evidence, Secs. 171, 180, Vol. 1.

Fickett v. Swift, 41 Me. 65, 68

(b) The admissions of a party to a fact wherever or however made, are evidence against him even though they may be found in an answer as a bill in chancery, when pertinent to the questions involved in the case on trial.

Robbins v. Butler, 24 Ill. 388

Hayman v. Wheeler, 29 Fed. 347

(c) Admissions set forth in pleadings, even though in another action, are admissible against a party in another and different action with other parties, if it be shown that such admissions were made with his knowledge or sanction, or by his direction.

Cook v. Barr, 44 N. Y. 156

(d) Admissions may be made in words, or they may be implied from assumed character, acts or conduct, and in some instances from silent acquiescence.

Elliott on Evidence, Vol. 1, Sec. 221

Perry v. Johnson et al, 59 Ala. 648

Block et al. v. Hicks, 27 Ga. 522.

(e) But it should appear that the language or conduct in question was known and understood by the party claimed to have acquiesced therein, and that he was naturally called upon to take some action or make some response thereto.

Martin v. Capitol Ins. Co., 85 Ia. 643-4

McElmurray v. Turner, 86 Ga. 215

Elliott on Evidence, Sec. 221, Vol. 1

(f) If the interest of a party is in jeopardy by statement made in his presence, an inference may be drawn that he had knowledge and acquiesced in such statement more or less strong in proportion to the inducement to make the denial.

Vale v. Strong, 10 Va. 457

(g) Whenever declarations have been made in the presence of a party in a suit to which he was not a party, under such circumstances as would call for a denial, such declarations may be submitted to the jury.

Vale v. Strong, 10 Va. 457

(h) Any statements made in the presence of such party as an auditor, is admissible unless he can show that he lacked either the opportunity or motive to deny its correctness.

Wigmore on Evidence, Vol. 2, bottom of page 1255

Elliott on Evidence, Sec. 231, pages 333, Vol. 1

Bathke v. Krassin, 82 Minn. 226

(i) Under some circumstances the party's mere seeing or perusal of the third party's document without responsive protest or denial or explanation, may indicate an admission of its correctness, each case standing virtually by itself.

Wigmore on Evidence, Vol. 2, page 1261, Sec. 1073, paragraph 1

Raub v. Nisbett, 118 Mich. 248

(j) Admissions made by an ancestor affecting the legal title to real property, are admissible in evidence against an heir of such an-

cestor in a suit brought by the grantor of such ancestor to quiet title to such property.

Elliott on Evidence, Sec. 267, Vol. 2

Chadwick v. Founnier, 69 N. Y. 404

Matton v. Young, 45 N. Y. 696

Boyworth v. St. Louis Assn. 174 U. S. 182,
189

(k) When a part of the pleadings of another action are competent and material as evidence in another and different action, the whole of such record, if it has any bearing upon the case before the court, may be offered in evidence.

Henderson, administrator de bonis non v.
Gargill, 31 Miss. 367

Wheeler v. Styles, 28 Tex. 240

III.

A writing agreeing to convey all of the real property of a grantor within the State of Oregon, especially in Multnomah and Clackamas Counties, is not void as being too indefinite and uncertain in its description of the property to be conveyed to be enforced, such instrument will obligate the party to convey all of the real property of the grantor within the said counties and state.

Tiffany on Law of Real Property, Vol. 2,
Sec. 387, p. 882

Pettigrew v. Dobbilaar, 63 Cal. 396

First Natl. Bank of Attleboro v. Hughes, 10
Mo. App. 7

Brown v. Warren, 16 Nev. 228

Marr v. Hobson, 22 Me. 321

Harney v. Edens, 69 Tex. 420

Clifton Heights Land Co. v. Randall, 82 Ia.
89

Jones' Law of Real Property in Conveyancing, Vol. 1, Sec. 347

Frey v. Clifford, 34 Cal. 335

Blair v. Burns, 8 Cal, 397

Wilson v. Boyce, 92 U. S. 325

(a) An unacknowledged deed, though not entitled to record, passes title and is a good conveyance, except as to a bona fide purchaser for value, and is good between the parties.

Manadas v. Mann, 14 Ore. 450

Security Trust Co. v. Lowenberg, 38 Ore.
163

Williams v. First Natl. Bank, 48 Ore. 575

Moore v. Thomas, 1 Ore. 201

Eadie v. Chambers, 172 Fed. 75

(b) A contract containing the essential terms of sale although not complete, is sufficient within the statute of frauds and parole evidence is admissible to explain ambiguities or supply omissions.

Salmon Falls Mnf. Co. v. Goddard, 14 Howard 446

Stubblefield v. Imbler, 33 Ore. 450

Saveland v. Western Wisconsin R. R. Co.,
118 Wis. 272

IV.

A verbal agreement of sale is sufficient to transfer the legal title to real property as against the vendor and those claiming under him, where the evidence shows that the purchase price has been paid and that the vendee went into possession, paid

the taxes and asserted title and ownership as against the vendor for more than twenty years.

Howell v. Ellesberry, 79 Ga. 481

Whiting v. Hay, 181 U. S. 91

Townsend v. Vanderwercker, 160 U. S. 183

Ward v. Cochran, 71 Fed. 131 —

(see facts page 128)

Dickerson v. Colgrove, 100 U. S. 578

Schnabel v. Schulz, 137 Fed. 395

Rosenblat v. Perkins, 18 Ore. 159

V.

It may be conceded that in law a deed to a co-partnership in the firm name alone would not pass title to the land, but such is not the rule in equity where it appears from the circumstances that the property was purchased for partnership purposes and that it was used by such partnership in connection with the business conducted by such co-partnership.

Dunlap et al. v. Green, 65 Fed. 242

M. J. Frost et al. v. Wolf, 77 Tex. 455-6

Foster v. Sargent, 72 N. H. 171

Johnson v. Hogan, 158 Mich. 648-9

Riddle v. Whitehill, 135 U. S. 631-34

Whitney v. Dewey, 158 Fed. 385-391

Schlichter Jute Cordage Co. v. Mulqueen,
142 Fed. 583-7

People v. Sholen, 244 Ill. 502

Holmes v. Self, 79 Ky. 297

(a) In equity an agreement to convey real estate signed by two members of a co-partnership in such a manner as to indicate that it was an agreement signed for and on behalf

of such co-partnership, is binding upon each member thereof who acquiesces in such agreement, and it passes title to such real property to the vendee upon the performance by him of his part of the agreement.

Dunlap et al. v. Green, 60 Fed. 242

Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944

Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583

M. J. Frost et al. v. Wolfe, 77 Tex. 455

Riddle v. Whitehill, 135 U. S. 634

(b) As to those who sign such agreement, upon the complete performance thereof by the vendee they are in equity divested of all their right, title and interest in such real property intended to be conveyed by such agreement.

Robbinson Bank v. Miller, 153 Ill. 244

Dunlap et al. v. Green, 60 Fed. 242

Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944

Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583

M. J. Frost et al. v. Wolfe, 77 Tex. 455

Brunson v. Morgan, 76 Ala. 594

Riddle v. Whitehill, 135 U. S. 634

VI.

In a suit to quiet title to real property commenced by the grantee, claiming under an agreement to convey by a co-partnership, which agreement was executed forty years prior to the commencement of such suit, the heirs claiming under a residuary clause in a will of one of the members of such co-partnership who signed such agreement,

are barred by laches and cannot prevail where it appears.

(a) That the grantee has performed his part of such agreement by paying the consideration therein named and has gone into possession and so remained for more than thirty years and has paid the taxes thereon and has expended further sums in reliance of such agreement; and

(b) That such heirs have not by any act or deed made it known that they ever claimed to have any interest in such real property since the death of such ancestor, notwithstanding the fact that such ancestor's estate has been administered and fully settled for more than twenty years, and that such heirs knew at the time of his death he was the owner of considerable real property within the State and in the county wherein such estate was administered, and that he had been engaged in building railroads and had acquired real property for such purposes.

Goddon v. Kimmel, 99 U. S. 201-210-225

Abrahams v. Ordway, 158 U. S. 416-422-429

Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685

Norris v. Haggin, 136 U. S. 386

Lane Co. v. Locke, 150 U. S. 193

Thorne Wire Hedge Co. v. Washburn Mfg. Co., 159 U. S. 423

Underwood v. Dugan, 139 U. S. 380

Fuller et al. v. Montague, 59 Fed. 212—
affirming 53 Fed. 204

Kemp v. Nickerson, 66 Fed. 682

Loomis v. Rosenthal, 34 Ore. 585

Swift v. Smith et al., 79 Fed. 709

Curtis et al. v. Lakin, 94 Fed. 251

(c) The question of laches does not depend upon the fact that a certain definite time has elapsed since a cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier.

Townsend v. Vanderwerker, 160 U. S. 172

Old Colony Trust Co. v. Dubuque Traction Co., 89 Fed. 794

Goddon v. Kimmel, 99 U. S. 201

(d) Laches cannot be imputed to one in the peaceable possession of the land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of his equitable rights and he need not assert them, only when he finds occasion to do so.

Ruckman v. Corey, 129 U. S. 387

Massenbury et al. v. Dennison, 71 Fed. 619

(e) Laches which will bar a suit in equity, depends on the particular circumstances of each case, and where the complainant in an action does not appear to have worked injury to any one, and it is not shown that there was any occasion for more promptly asserting his rights, the defense will not prevail.

Hanchett v. Blair, 100 Fed. 817

(f) Ignorance which is the effect of negligence, is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent

to knowledge of all the facts which a reasonably diligent inquiry would disclose. Whatever is notice enough to invite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led and when a person has such knowledge to lead him to investigate a fact, he shall be deemed conversant with it.

Swift v. Smith et al., 79 Fed. 709

Wood v. Carpenter, 101 U. S. 135

Metropolitan Bank v. St. Louis Dispatch Co.,
149 U. S. 436

Felix v. Patrick, 145 U. S. 317

VII.

Where a corporation goes into actual possession of real property, claiming title thereto under an imperfectly written and imperfectly executed agreement, and remains in possession thereof openly, continuously, notoriously and adversely to another who claims to hold the superior legal title, for a period of more than ten years, title thereto is perfected in such corporation as against the person or persons claiming same under the record title.

(a) What constitutes actual possession is governed largely by the surrounding circumstances, and the evidence necessary to establish actual adverse possession varies in each particular case, much depending upon the situation of the property and the use to which it may be applied.

Bowen v. Guild. 130 Mass. 123.

(b) It is not the particular use made of the land, or whether it has been built upon

and used as a residence, or used, cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations which show the visible, open and exclusive possession and use of the land.

Mooney v. Coolidge, 30 Ark. 655

(c) Although there may be actual entry, neither actual occupation, cultivation nor residence is necessary where the property is so situated as not to admit of any permanent improvement or cultivation, but where acts of ownership have been done upon the land from the nature of which indicate continuous claim of title and are continued long enough, such acts are evidence of an adverse possession for the consideration of a jury.

Dorr v. School District, 40 Ark. 237

Kerr v. Hitt, 75 Ill. 51

Coleman v. Billings, 89 Ill. 183

Washburn v. Cutter, 17 Minn. 361

Fugate v. Pierce, 49 Mo. 441

Draper v. Shute, 25 Mo. 203

(d) The payment of taxes and surveying of the premises may be considered as evidence of the claim of ownership.

Green County v. Eubank, 80 Ala. 204

Raynor v. Lee, 20 Mich. 387

Murray v. Hudson, 65 Mich. 676

McClure v. Jones, 121 Pa. St. 151

Payne v. Hutchins, 49 Vt. 314

Walter v. Gibbs, 97 Ill. 118

Little v. Downing, 37 N. H. 355

(e) Adverse possession of unproductive land is shown by the recording of deed under which the occupant claims, payment of taxes,

cutting of all the valuable timber, going upon the lands at intervals, claiming absolute ownership, employment of agents in the neighborhood to look after it, and the building of a brush fence around the portion cleared, without proof of actual occupancy.

Stevens v. Taft, 17 Gray 33

Groft v. Weekland, 34 Pa. St. 304

Washburn on Railroad Property, Vol. 3, 134

Ellicut v. Pearl, 10 Peters (U. S.) 412

Ewing v. Burnett, 11 Peters (U. S.) 41

VIII.

Where a private corporation has an existence in fact and is acting under color of law, its right to exist as a legal entity cannot be attacked collaterally by private parties, unless it is shown that such corporation has been declared to be an illegally organized corporate body in a direct proceeding instituted by the state for that very purpose.

Cook on Corporations, Sec. 637, p. 1804

Central Ry. Co., v. Union Ry. Co., 144 Ala. 639

Independent Order v. United Order, 94 Wis. 230

Soule Falls Bridge Co. v. Fisk, 23 N. H. 171

Leavenwood v. McGee, 50 Or. 233

Masters v. Umpqua Valley Oil Co., 90 Pac. 151

The right of a corporation to acquire and hold real estate in excess of what it is authorized to hold by its charter, cannot be questioned by private parties, and the only remedy being a pro-

ceeding against it by the state to forfeit its charter.

Thompson on Corporations, Vol. 3, 2nd Ed.,
Sec. 2397

Fayette Land Co. v. Louisville & N. R. R.
Co., 93 Va. 274

Bone v. Delaware & C. Canal Co., 5 Atl.
751

Colorado Etc. Co., v. Am. Etc. Co., 97 Fed.
843

Brown v. Schleier, 118 Fed. 981

Pullman's P. C. Co., v. Central Trans. Co.
171 U. S. 138

Alexandria &c. R. R. Co., v. Johnson, 58
Kan. 175

Peru Etc. Co. v. Harker, 144 Fed. 673

Brigham v. Peter Etc. Hospital, 126 Fed.
796

Rogers v. Nashville R. Co., 91 Fed. 299

IX.

In a proceeding to quiet title to certain lands, it will be presumed that a conveyance was duly executed and delivered to a corporation in possession thereof, where the evidence adduced shows

First: That such corporation has been in the actual, open, exclusive, notorious and adverse possession of said lands for more than forty years; and

Second: That it has paid the taxes thereon during each and every year of the said period of forty years; and

Third: That certain persons who claim the record title to said lands under and by virtue of a will executed Sept. 27, 1875, and probated Oct. 11th, 1887, as residuary devisees, have never made any claim to the lands, nor paid the taxes thereon since said will was executed or probated; and

Fourth: That neither the testator nor any other person in privity with him, have during said period of forty years, in any manner by act or deed, indicated that they claimed any interest in said lands, or any part thereof.

Fletcher v. Fuller, 120 U. S. 534

Record v. Wheaton, 7 Wheaton (U. S.) 59

Holtzman v. Douglas, 168 U. S. 284

United States v. Chavez, 175 U. S. 520

ARGUMENT

I.

THE LANDS HEREINBEFORE DESCRIBED WERE NECESSARY AND INDISPENSABLE TO THE FIRM OF BEN HOLLADAY & COMPANY IN BUILDING A RAILROAD FOR THE OREGON CENTRAL RAILROAD COMPANY, AND WERE PURCHASED FOR THIS PURPOSE.

It is claimed by complainant that the real property hereinbefore described was agreed to be conveyed unto the Oregon Central Railroad Company by the firm of Ben Holladay & Company, a co-partnership, and by Ben Holladay and C. Temple

Emmet on the 28th day of March, 1870. Upon that date a writing was signed by Ben Holladay and C. Temple Emmet for and on behalf of the co-partnership and for themselves individually, in which they agreed to convey unto the Oregon Central Railroad Company in addition to various other items of personal property, the lands which are now subject to controversy before the court. Owing to the great lapse of time since the execution of this agreement, complainant has been unable to produce any witnesses who had primary knowledge of its existence, execution and delivery and has been compelled to present evidence showing the situation of the parties and their relation to each other with reference to these lands prior to, at the time of and subsequent to the execution of the said agreement of March 28, 1870. From these circumstances, when considered with the secondary evidence in the record as to its existence, execution and delivery, it will no doubt be clear to the court that it was signed and delivered on the day and date as alleged in paragraph VIII of complainant's complaint, and that it was an agreement of the parties signing it to convey said lands unto the Oregon Central Railroad Company.

A brief examination of the evidence submitted concerning the events occurring prior to the 28th day of March, 1870, discloses that these lands were purchased by Ben Holladay & Company within a few months after that firm had assumed the contract which had theretofore been entered into by and between A. J. Cook & Company and the

Oregon Central Railroad Company. By the terms of this agreement between A. J. Cook & Company and the Oregon Central Railroad Company, A. J. Cook & Company were to construct a railroad for the Oregon Central Railroad Company from Portland, Oregon, south to the California state line.

The evidence will further show that these lands were purchased for the purpose of securing the timber thereon and for mill sites for the erection of saw mills to manufacture such timber into ties and bridge timbers which were necessary in the building of said railroad.

The evidence in the record will further show that saw mills were located upon these lands and that the timber thereon was used for railroad ties and other timbers necessary in the construction of the first twenty miles of this railroad.

The object of complainant in presenting these facts to the court is to show that the purchase of these lands by the firm of Ben Holladay & Company was one of the expenditures necessary to the firm of Ben Holladay & Company in carrying out their contract with the Oregon Central, and that these lands would not have been purchased by the firm of Ben Holladay & Company at the time they were so purchased for any other purpose than for the uses to which they were put, and to identify these lands as within the contract of March 28, 1870. Further, that it was no doubt one of the expenditures for which the

firm of Ben Holladay & Company expected the Oregon Central Railroad Company to reimburse them, and this being so, it was the intention of Ben Holladay & Company in signing the agreement of March 28, 1870, to include these lands with the other property therein enumerated as a part of the consideration passing to the Oregon Central Railroad Company for the payment unto the said firm of Ben Holladay & Company by the Oregon Central Railroad Company of the sum of \$800,000.

If complainant succeeds in establishing it to be a fact, that these lands were purchased for no other purpose, than for the timber thereon, and for the location of sawmills, to manufacture railroad ties, bridge timbers, etc., for the Oregon Central Railroad Company, the lands described in the agreement of March 28th, 1870, will be identified, and it will have succeeded in overthrowing the only substantial basis upon which defendant rests her case. The other points relied upon by the defendant are purely technical and do not go to the merits. If the court should agree with the defendant that the purchase of these lands had no connection with the building of the Oregon Central road, and that they were not used to any extent whatsoever for such purpose, then it would indeed be a serious question as to whether or not the agreement of March 28th, 1870, was executed by Ben Holladay & Company with the intention of agreeing to convey the lands in dispute to the Oregon Central Railroad Company, for the reason

that the general description in the contract would fail to identify these lands. Such a conclusion, however, is impossible in view of the facts hereinafter set out.

That there did exist a co-partnership by the name of A. J. Cook & Company and that they had entered into a contract with the Oregon Central Railroad Company to build its railroad from Portland, Oregon, south to the California state line, see complainant's Exhibits 23 and 24, pages 1155 to 1176, and 1183 to 1200 of the transcript of record, Vol. III.

That this contract was assumed by the firm of Ben Holladay & Company, see page 1176 of the transcript of record, Vol. III.

It is not disputed that the firm of Ben Holladay & Company was formed and that Ben Holladay was a member of such co-partnership, and that the primary object of such co-partnership was to take up and complete the work of building the railroad for the Oregon Central Railroad Company which had been commenced by A. J. Cook & Company, nor is there any dispute that the firm of Ben Holladay & Company built the first 20 miles of this railroad. See page 398 of the transcript of record, Vol. I.

Soon after assuming the A. J. Cook & Company contract, the firm of Ben Holladay & Company secured leases to cut and remove all of the timber on the lands hereinbefore described and to erect

saw mills thereon. These leases were dated November 18, 1868—see Exhibits 39 and 40 on pages 1353, 1354, 1355, 1356 and 1357 of transcript of record, Vol. III. One was secured from James Grindley for the following described land: East Half of the Southeast Quarter and lots numbered five and six of section twenty-nine, township one south, range two east of the Willamette Meridian; and the other from Gardner Elliott for the following described land: North Half of the Northeast Quarter of section thirty-two, township one south, range two east of the Willamette Meridian. These lands will be referred to hereinafter as Grindley and Elliott tracts.

From Exhibit 43 (see pages 1363 to 1376 inclusive, transcript of record, Vol. III) it appears that James Grindley received a patent from the United States Government on the 5th day of August, 1869. Prior thereto, towit, on May 4, 1869, he deeded the same land to the firm of Ben Holladay & Company.

Gardner Elliott secured patent from the United States Government on the second day of May, 1870, and on the 5th day of October, 1869, prior thereto, Gardner Elliott and wife deeded this tract to the firm of Ben Holladay & Company. See Exhibit 43, which is an abstract of title to these lands and which contains a complete history up to the time they were conveyed unto the firm of Ben Holladay & Company. Certified copies of the deeds and leases just referred to are represented

by Exhibits 39, 40, 41 and 42. (See pages 1353 to 1376 inclusive, transcript of record, Vol. III).

The theory of the defendant seems to be that at the time the firm of Ben Holladay & Company acquired the Grindley and Elliott tracts, the timber thereon had been removed and that such fact is a circumstance from which it is to be concluded that the lands were not purchased by Ben Holladay & Company for the purpose of aiding it in carrying out its contract with the Oregon Central Railroad Company, and are therefore not within the general description of the contract of March 28th, 1870. That this conclusion is incorrect is evidenced by an analysis of the evidence pertaining to the following facts:

FIRST: Referring to Exhibit 43, it appears that the leases to cut and remove the timber were made to Ben Holladay & Company before patents had been issued by the United States. While it does not appear from the abstract (Exhibit 43), (see pages 1363 to 1376 inclusive, transcript of Record, Vol. III) just on what date the claims were approved and allowed by the local land office, it is fair to assume that in the usual course of things, they were approved and allowed during the interval, beginning on the date the leases were made between Grindley and Elliott and Ben Holladay & Company, and the date on which patents were issued. From this it may be inferred that the only reason the firm of Ben Holladay & Company did not purchase these lands and take deeds

thereto on the date that the leases were made, was that it was not known then whether or not the Grindley and Elliott claims would be allowed.

It is hardly probable that Ben Holladay, or Ben Holladay & Company would have purchased these lands after the timber had all been removed, especially in view of the existence of the leases which gave them sufficient right to cut and remove the timber and to erect their saw mills. It was no doubt agreed between the firm of Ben Holladay & Company, James Grindley and Gardner Elliott at the time these leases were made, that as soon as the claims of Grindley and Elliott were allowed and final proof made deeds would be executed and that the balance of the purchase price agreed upon at the time the leases were executed would be paid by the firm of Ben Holladay & Company. If this were not so and the defendant's contention that at the time the deeds were executed that it was just a spontaneous thought on the part of Ben Holladay that it would be a good speculation to purchase these lands, why should he have created any doubt in the matter by having the deeds read to Ben Holladay & Company instead of to himself.

SECOND: When the firm of Ben Holladay & Company assumed the contract of A. J. Cook & Company—see pages 340 and 343 of the transcript of record, Vol. I, also Exhibit 24 (which is a complaint in the suit of Ben Holladay & Company vs. S. G. Elliott, to which is attached a copy of Ben Holladay & Company's co-partnership agreement,

wherein it is stated that Ben Holladay & Company are to purchase the contract of A. J. Cook & Company), (see pages 1183 to 1200 inclusive, transcript of record, Vol. III) they had thereby undertaken to carry it out in full by building the road to the California state line. Owing to certain difficulties which have been referred to in the statement of facts and which are not material to the point to be made at this time, the firm of Ben Holladay & Company, at their request, were released from this undertaking and a new agreement was entered into on the 7th day of September, 1869. By the terms of this agreement the firm of Ben Holladay & Company were to construct only the first 20 miles of railroad. And it is further provided in this agreement that the Oregon Central Railroad Company should transfer unto the firm of Ben Holladay & Company all of its stock issue, with the exception of fifteen shares, also all of the bonds of the Company. These transfers were to be made for the purpose of securing the firm of Ben Holladay & Company for any sums which they had already expended in constructing said railroad, and for any sum which they would have to expend thereafter in building the first 20 miles of road. See pages 379 to 380, inclusive, of transcript of record, Vol. I.

The Elliott tract was not purchased until after this agreement of September 7, 1869 was entered into. From Exhibit 43, page 1365 of transcript of record, Vol. III, also Exhibit 41, pages 1358,

1359, transcript of record, Vol. III (which is a certified copy of the deed from Elliott to the firm of Ben Holladay & Company), it is shown that this deed was executed on the 5th day of October, 1869. This tends to show that when purchasing the Elliott tract at least, the firm of Ben Holladay & Company intended that the Oregon Central should reimburse them for such outlay, and that this land was a part of the real property used or acquired for the construction of the road. Further, it was an inopportune time for Ben Holladay to have caused a deed to be executed to this tract in the name of Ben Holladay & Company if it was his intention to have acquired same for his own use and benefit, for the reason that it would be a circumstance which would furnish argument to the effect that it was purchased for railroad construction purposes, and that the Oregon Central was to repay the firm of Ben Holladay & Company for same upon final settlement of their affairs, and that under the agreement of March 28th, 1870, it would be identified as one of the tracts used or acquired for railroad purposes.

It is not reasonable to assume that a man of Ben Holladay's business ability would have repeated the error of a few months before, by causing a deed to property he was purchasing individually to be made in such a manner as to indicate that others were to share in it.

As will hereafter appear, all of the timber was not removed, but, on the other hand, a considerable

amount must have been taken off by Ben Holladay & Company after these deeds from Grindley and Elliott had been executed, and that the timber was used in constructing the first 20 miles of the Oregon Central railroad. If, as the defendant contends, the firm of Ben Holladay & Company did not own the lands at the time the timber was removed, then the timber could have been removed only by virtue of the existence of the leases above referred to, and this being true, if it was the intention of Ben Holladay to purchase these lands for his own use and benefit, these leases were at the time encumbrances against the land. An examination of the deeds fails to show that they were so mentioned or referred to as encumbrances, and if they had been considered as encumbrances at this time Grindley and Elliott would no doubt have insisted that these encumbrances be excepted when executing the deeds above referred to. When the leases were made, it is probable that final proof had not been made as to either tract, and sales could not legally have been made, and the leases were to be merely temporary instruments, permitting the lessees to assume ownership until final proof and until deeds could be made.

THIRD: From Exhibit 3 (which are the pay rolls of mill No. 3) it is clear that all of the timber was not removed from the Grindley and Elliott tracts on the 4th day of May, 1869, as this mill was still in operation during the month of June thereafter. Furthermore, there appears in Ex-

hibit 23, (page 1176 of transcript of record, Vol. III, paragraph 9), (which is a certified copy of the findings of the Supreme Court of the State of Oregon on an appeal from Marion County, in the suit of Ben Holladay, et al. vs. S. G. Elliott et al), that the greater portion of the first 20 miles of road was constructed subsequent to the purchase of the Elliott tract, which was on the 4th day of October, 1869. The construction was completed December 24th, 1869, and the final work was rushed so as to finish within the time required by the Act of Congress.

In paragraph IX of the findings of the court page 1176 of transcript of record, Vol. III), it is stated that during the month of May only nine and July only ten men were employed on the whole line of the road from Portland to Salem; that the appellant was absent in the Atlantic States during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm and the best season of the year for profitable labor in railroad building was suffered to go by, and the appellant was discharged by the firm of Ben Holladay & Company from their employment as general superintendent, on the 4th day of October, 1869, a largely increased force of laborers were placed on the road, far higher wages were paid for workmen, and in this way the section of twenty miles was completed on the 24th day of December, 1869.

These findings must have been based upon evidence in the record in support thereof and are conclusive that a considerable portion of the timber must have been removed from the Grindley and Elliott tracts subsequent to the 4th day of October, 1869.

FOURTH: The testimony of a number of witnesses who were employed by the firm of Ben Holladay & Company during the periods just above referred to, discloses that saw mills were operated by Ben Holladay & Company and that they were used to manufacture the timber on these lands into ties and bridge timbers, and that such ties and bridge timbers were used in building the Oregon Central railroad.

First, the testimony of Mr. A. M. Elam, which appears on pages 87 to 98, inclusive, of the transcript, Vol. III. Mr. Elam testified that he was an employee of Ben Holladay & Company during the winter of 1869, and was engaged in hauling ties from the saw mill operated by Ben Holladay & Company and which was located on what is known as the Gardner Elliott 80 acre tract (see page 89 of transcript of record, Vol. III), to the Oregon Central railroad, which was then being constructed (see page 90 of transcript of record, Vol. III).

On pages 89 and 90 of the transcript of record, Vol. III, Mr. Elam states that the reason he remembers that it was in the fall or winter that he hauled ties from saw mills No. 2 and 3, was that it rained considerable and was during the rainy

season. He further stated that in hauling ties he traveled over what was referred to as the diagonal road, and which he located as being on one of the tracts in dispute (see page 91 of the transcript, Vol. III); that at the time he was employed in hauling ties he noticed that there was considerable timber on these lands and that it had not all been removed (see pages 92 and 93 of transcript, Vol. III). On cross examination he was very positive in stating that these mills which were located on these lands were operated by the Ben Holladay crowd.

The testimony of Samuel E. Wishard shows that he was an employee of the Oregon Central Railroad Company in 1868 or 9; that he was paid by Ben Holladay and that he was foreman and as such built the carriage for what is known as mill No. 1 (see page 108 of transcript, Vol. III); also gave location of mill No. 2, stating that it was built for manufacturing railroad ties and timber (see page 109 of transcript, Vol. III); that he never was at mill No. 3, but knew that such a mill was in existence (see page 110 of transcript, Vol. III) and that the Company had another mill designated as mill No. 4 near the Milwaukie Station (see page 114 of transcript, Vol. III), and that all of the mills were operated by the firm of Ben Holladay & Company and were all used to manufacture railroad ties, etc., for the Oregon Central Railroad (see pages 113 and 114 of transcript, Vol. III).

On page 111 of transcript, Vol. III, Mr. Wishard also locates the diagonal road by pointing it out from a blue print in evidence, marked Complainant's Exhibit No. 2. Witness further states that he made a recent investigation of the lands at the request of Mr. Fenton and found evidence of an old saw mill site (see pages 110 to 113 of transcript, Vol. III), and on the witness stand located these old mill sites on blue prints in evidence (see pages 112 and 113 of transcript). He further stated that he knew James Grindley and Gardner Elliott and that they were employed by the firm of Ben Holladay & Company (see pages 115 to 121 of transcript, Vol. III).

On page 113, witness further stated that in making the investigations at the request of Mr. Fenton, he noticed many indications showing that these lands had been logged off a good many years ago; also that these lands had been burned over; that the remains of the old saw mill site showed signs of having been through a fire.

On pages 116 and 117, this witness was shown Exhibit D, which is a part of the deposition of S. G. Elliott, taken May 29, 1871, in the suit of Holladay et al. vs. S. G. Elliott et al, which appeared to be pay rolls showing certain sums of money having been paid to James Grindley and Gardner Elliott. He was asked whether or not the names of Grindley and Elliott as appeared on Exhibit D were the same persons who took up what are known as cash entries No. 641 and 693.

Witness stated that he did not know that they were, but, on the other hand stated that he did not know of any other persons in the vicinity at this time bearing the names of James Grindley and Gardner Elliott other than those whose names appeared on the pay roll referred to in this deposition as Exhibit D, and that he never knew of any other persons bearing the name of James Grindley or Gardner Elliott taking up any land in this vicinity.

Edward S. Elliott, called by the complainant, stated that he was a son of Gardner Elliott, who was the grantor named in the deed to Ben Holladay & Company as evidenced by Exhibit 42 on page 1361 of transcript, Vol. III, (see pages 174 and 175 of transcript, Vol. I); that he recalls the firm of Ben Holladay & Company, and that such firm operated saw mills designated as mills No. 1, 2 and 3, and that railroad ties, bridge timbers, etc., were manufactured by these mills for the building of the Oregon Central railroad (see pages 177 and 178 of transcript, Vol. I); that Gardner Elliott, his father, built mill No. 3 for Ben Holladay & Company (see page 178 of transcript, Vol. I). Also stated that the Grindley tract, which was immediately north of the Gardner Elliott tract, was purchased by Ben Holladay & Company about the time mill No. 3 was built, and that the timber on this tract also was manufactured by the firm of Ben Holladay & Company into railroad ties and bridge timbers (see page 179 of transcript, Vol. I).

This witness was shown the original pay rolls of saw mill No. 3, and among the list of employees appeared the names of Gardner Elliott and James Grindley, whose signatures appeared upon this pay roll as having received certain sums of money as wages. Witness identified the signature of Gardner Elliott, but was not familiar with the handwriting of James Grindley (see pages 192 to 193 of transcript, Vol. I).

A. N. Wills, another witness for complainant, testified that he had lived in the vicinity of these lands in question when he was a boy and passed the saw mills on his way to school (see pages 202 and 211 of transcript, Vol. I), and remembers that mills No. 2 and No. 3 were located about the center of what is known as the Gardner Elliott tract, and that these mills were operated by Ben Holladay & Company (see pages 201 and 202 of transcript, Vol. I) to manufacture railroad ties, bridge timbers, etc., for the construction of the Oregon Central railroad, and that his uncle was head sawyer (see page 204 of transcript, Vol. I).

This witness also located the diagonal road as being upon the Elliott tract, and leads from a certain point, pointing it out on the blue print, down towards the Clackamas Station, and that this road had been there as long as he could remember (see pages 202 and 203 of transcript, Vol. I).

The witness was also shown Exhibit 2, which purports to show an old saw mill location about

the center of the Elliott eighty, east and west and little south of the center, and stated that as near as he could recollect, this old mill must have been about a quarter of a mile from road running straight to Clackamas Station toward Oregon City, and about a quarter of a mile west of that (see page 204 of transcript, Vol. I).

Also, see testimony of J. T. Apperson, which was in substance that he had been upon the lands in 1869 and had seen saw mills thereon and that these saw mills and property were generally known to be the property of Holladay & Company and that a great many men were employed in and about these mills and that they were used for the purpose of manufacturing railroad ties, bridge timbers, etc., for the construction of the Oregon Central Railroad (see pages 673 to 679 of transcript, Vol. II).

From the testimony of these witnesses just above briefly outlined, it is very clear that these lands were purchased by Ben Holladay & Company and that the timber thereon was manufactured and used by Ben Holladay & Company in the construction of the first 20 miles of railroad for the Oregon Central.

From the testimony of these witnesses when considered in connection with the other facts referred to above, it is hardly possible to conclude that the Grindley and Elliott tracts were purchased by Ben Holladay individually and for his own use and benefit, but on the other hand, must have

been purchased by Ben Holladay & Company for use in and about the building of the first 20 miles of railroad for the Oregon Central Railroad Company. This being so, it would not be logical to conclude that upon the completion of the road and after the timber had been removed, that in making a final settlement with the Oregon Central Railroad Company, Ben Holladay & Company would not take into account the sums of money they had expended for these lands. This evidence identifies these lands as within the contract of March 28th, 1870.

SUMMARY OF THE FOREGOING PRELIMINARY MATTERS.

The evidence just referred to above shows:

FIRST: That the firm of A. J. Cook & Company, a co-partnership, was formed and that its business was principally to build and construct a railroad for the Oregon Central Railroad Company.

SECOND: That this contract was later assumed by another co-partnership styled Ben Holladay & Company, of which Ben Holladay was a member and principal owner.

THIRD: That the Grindley and Elliott tracts, the lands which are the subject of this dispute, were purchased by the firm of Ben Holladay & Company for the timber thereon and for the

location of saw mills to manufacture such timber into ties and other timbers for railroad construction purposes.

FOURTH: That the timber thereon was used by Ben Holladay & Company in building the first 20 miles of railroad for the Oregon Central from Portland, Oregon, for a distance of about twenty miles south.

FIFTH: That the deed to these tracts, evidenced by Exhibits 41 and 42, read from James Grindley and Gardner Elliott to Ben Holladay & Company.

The Court's attention has been directed to these facts not for the purpose of showing that these lands were purchased by Ben Holladay & Company as a co-partnership, but to show that there was only one reason for their having been purchased at the time they were so purchased and that this reason was that the timber thereon was necessary and indispensable to the firm of Ben Holladay & Company in building the first 20 miles of road for the Oregon Central. But keeping in mind the events just referred to, in considering what follows the completion of the first twenty miles of road, which will be shown by the record, it becomes very clear that these lands were purchased primarily for the use and benefit of Ben Holladay & Company, in the construction of the Oregon Central Railroad Company and that they were to be conveyed by Ben Holladay & Company to, and ultimately paid for by the Oregon Central Railroad

Company. The fact that these lands were so used and purchased identifies them as within the description contained in the agreement of March 28, 1870.

DEFENDANT'S EXCEPTIONS

Defendant's bill of exceptions embodies certain objections to the introduction of complainant's exhibits which will be more appropriately considered at the times they are discussed in connection with the point in hand. The general objection that no foundation has been laid for the introduction of secondary evidence to show the existence, execution and delivery of the agreement of March 28, 1870, will be satisfied when it is shown hereinafter that this agreement has been lost or destroyed and that sufficient search has been made to find it. Furthermore, Ben Holladay & Company and Ben Holladay are estopped by the corporate records of the Oregon Central Railroad Company, to deny that the copy set out therein is not a true copy of the original.

Defendant excepts to the admission of Exhibits 21 and 24 as being incompetent, irrevelant and immaterial.

This exception is not well taken, as it appears that Exhibits 21 and 24, (These exhibits appear upon pages 1155 to 1172, and 1183 to 1214 of transcript, Vol. III) are part of the pleadings in the case of Ben Holladay et al, vs. S. G. Elliott et al., wherein Ben Holladay was a party. Exhibit

21 is referred to and identified in said suit as Exhibit C, and it is admitted in said suit that said Exhibit C, is a copy of the contract entered into by and between A. J. Cook & Company and the Oregon Central Railroad Company. It further appears upon the face of this contract that it was cancelled by mutual agreement of Ben Holladay & Company and the Oregon Central, after the firm of Ben Holladay & Company had assumed such contract and had finished the first 20 miles of railroad. The existence of this agreement is one of the issues raised by the pleadings (see paragraph VI of the complaint, on page 4 of transcript, Vol. I, and paragraph V of defendant's answer, on page 27 of transcript, Vol. I).

"Evidence may be offered of any fact or facts made an issue in a case at bar by the terms of the pleadings, under the rules of pleading."

Wigmore on Evidence, Sec. 3, Vol. I.

Ben Holladay having admitted that such an agreement was executed and delivered, in his amended complaint in said dissolution suit, and the making of said agreement a part of the pleadings, amounts to an admission against interest, and is competent evidence to establish the allegation of paragraph VI of the complaint.

Jones Electric Co. v. Jonathan Clark & Sons, 108 Fed. 170

Elliott on Evidence, Sec. 257, Vol. I

This exhibit is further objected to as not having been properly authenticated or identified.

This exhibit was introduced in evidence through J. C. Moreland, who was one of the witnesses called for the complainant. Judge Moreland stated that he was Clerk of the Supreme Court of the State of Oregon, and that he was appointed referee in the suit entitled Ben Holladay et al. vs. S. G. Elliott et al., and in said suit recalls seeing this agreement; also recognized the handwriting of Ben Holladay and A. J. Cook appearing on said agreement (see pages 867 and 868 of the transcript, Vol. II).

Exhibit 21 (appearing upon pages 1152-1172 transcript, Vol. III) is also properly before the Court in the case at bar for the reason that it is a certified copy of the original of said agreement, under the hand and seal of J. C. Moreland, Clerk of the Supreme Court of the State of Oregon.

That the above sufficiently identifies Exhibit 21, see

Jones on Evidence, Sec. 623, and cases cited.
Also see Section 752 Lord's Oregon Laws.

Exhibit 23 (appearing upon pages 1173 to 1183 transcript, Vol. III) being a part of the pleadings in the said suit entitled Ben Holladay et al. v. S. G. Elliott et al., wherein Exhibit 21 above referred to is an exhibit, is subject to substantially the same rules as to its being properly authenticated.

As to its competency, the Court is referred to paragraph IX of said Exhibit 23 (page 1176 of transcript, Vol. III) which is a finding that tends to disprove the contention of the defendant that all of the timber on the lands designated as the Grindley

and Elliott tracts was removed prior to the purchase by Ben Holladay & Company.

“Where the whole of a record which could have any bearing upon the case before the court is offered in evidence, it should be admitted.”

Henderson Administrator de bonus non v.
Micajah Cargill et al., 31 Miss. 367.

This exhibit was introduced in evidence through J. C. Moreland, one of the witnesses for complainant. (See pages 865, 866 and 868 of transcript, Vol. II).

There is another objection to the introduction of Exhibits 23 and 24, namely, that no foundation has been laid showing the existence, execution and delivery of the agreement of March 28, 1870, and that such original agreement has been lost and that a proper search has been made for same.

This objection will be satisfied when considered in connection with complainant's reply to the objections to Exhibit 7, and will be governed by the same rules.

II.

ON THE 28TH DAY OF MARCH, 1870, THE FIRM OF BEN HOLLADAY & COMPANY AND BEN HOLLADAY AND C. TEMPLE EMMET AS INDIVIDUALS, EXECUTED AN AGREEMENT, AGREEING TO CONVEY THE LANDS HEREINBEFORE REFERRED TO AS THE GRINDLEY & ELLIOTT TRACTS UNTO THE OREGON CENTRAL RAILROAD COMPANY.

To prove the above proposition involves the discussion of the points referred to under sub-division 1 of Statement of Points.

Complainant has offered in evidence the minute book of the Oregon Central Railroad Company, which is designated as Complainant's Exhibit 7. On pages 160 and 208 thereof (see pages 380 and 440 of the transcript, Vol. I), there is set out what complainant claims to be a true copy of the original of this agreement. This agreement is as follows:

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, Ben Holladay and Company, of Portland, Oregon, in consideration of the cancellation of this date by the "Oregon Central Railroad Company" at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua, and Rogue River Valleys to the California line, and the agreement of such company to pay the undersigned for all moneys

laid out, expended, and incurred under such contracts, to-wit:—an amount not less than eight hundred thousand dollars in U. S. Gold coin. “It being a part of this arrangement that all the property hereinafter specified should be transferred and delivered to said company, and in consideration of the full sum of One Dollar to us in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered and conveyed, and by these presents, we Ben Holladay & Company, do sell, assign, set over, transfer, deliver and convey unto said “Oregon Central Railroad Company,” of Salem, Oregon, all saw mills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing, tackle and all leases and all property of every name and nature now owned by Co. in the possession of Ben Holladay & Co. all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing tackle, railroad ties, iron rail spikes and other railroad materials now and heretofore used by us in the construction of the “Oregon Central Railroad Company.” *It being the intention of this conveyance to transfer to said “Oregon Central Railroad Company” all property real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon.*

TO HAVE AND TO HOLD the said property and every part thereof unto the said "Oregon Central Railroad Company," of Salem, Oregon, its successors and assigns absolutely and forever.

IN WITNESS WHEREOF we have hereto set our hands and seals this 28th day of March A. D. 1870.

BEN HOLLADAY,
C. TEMPLE EMMET,
By Ben Holladay, Attorney in Fact
BEN HOLLADAY & CO.,
By Ben Holladay.

Five cent U. S. R.
stamp cancelled.

Before entering upon a discussion of the rules of evidence involved, the Court will first be asked to consider the evidence submitted as to whether or not such an agreement was in fact ever executed. No harm can be done by varying to this extent the general rules as to the introduction of secondary evidence of the lost document.

For the time being, we will assume that the loss and destruction of the original agreement of March 28th, 1870, has been satisfactorily proven; also that complainant's Exhibits 7, 26, 51-2-3 and 4, and 61 are properly before the Court.

The firm of Ben Holladay & Company by an agreement of September 7, 1869, as is evidenced by the minutes of the proceedings of the Oregon Central Railroad Company (see pages 379 to 388 of

transcript, Vol. I), hereinbefore referred to, came into possession of all of the stock and bonds of the Oregon Central with the exception of 15 shares, thereby placing the affairs of the Oregon Central Railroad Company under the control of Ben Holladay, who was in control of the firm of Ben Holladay & Company, he being the owner of a majority in interest of such co-partnership. (See Exhibit 24, page 1, appearing upon page 1184 of transcript, Vol. III). This agreement appears to have been entered into for the purpose of releasing the firm of Ben Holladay & Company from the obligation of completing the work undertaken by A. J. Cook & Company, and to protect the firm of Ben Holladay & Company as to the sums already expended and for any further expenditures necessary in completing the first 20 miles of road which by the new agreement of September 7, 1869, they were required to build.

After the first twenty miles of road has been finished, (see page 411 of transcript, Vol. I), in accordance with the terms of the agreement of September 7, 1869, and prior to the 28th day of March, 1870, the Oregon and California Railroad Company seems to have been organized. (It was in fact incorporated on March 17th, 1870). See pages 418-419 of transcript, Vol. I, where appears an offer of the Oregon and California Railroad Company to purchase the Oregon Central. On the same date the record shows that Ben Holladay & Company submitted to the Oregon Central a proposition wherein

Ben Holladay & Company offered to enter into an agreement to reconvey to the Oregon Central all of the stock and bonds pledged with Ben Holladay & Company by the agreement of September 7, 1869, and in addition thereto the telegraph lines so far as completed, together with uncompleted portion of the lines, including all rolling stock and other property belonging thereto or connected therewith, and all mills, machine shops, machinery, tools, implements, horses, mules, carts, live stock, and all property of every name and description now owned or *standing in the name of Ben Holladay & Company in Oregon or in their possession and intended for use in and about the construction of such railroad.* This proposition also contained a provision to the effect that the Oregon Central was to pay to the firm of Ben Holladay & Company a sum not less than \$800,000.00 nor more than \$1,000,000.00 for the transfer of the property above referred to. (See pages 393 to 403 transcript, Vol. I).

This proposition was accepted by the board of directors of the Oregon Central Railroad Company on the same day it was submitted (see pages 401 and 402 of transcript, Vol. I).

The record further shows that on this same date, the Oregon and California Railroad Company submitted a proposition to the Oregon Central Railroad Company to purchase the franchise and all other property of every kind or nature of the Oregon Central. This proposition was in the form of a resolution, which appears to have been passed on

the 26th day of March, 1870, by the board of directors of the Oregon and California Railroad Company, in which they empowered and authorized *Ben Holladay* to negotiate for the purchase of the Oregon Central Railroad. By the terms of this resolution, the Oregon Central Railroad Company, if it accepted this offer, was required to transfer unto the Oregon and California Railroad Company all the rolling stock and other property connected therewith, including also all the property, real, personal and mixed "now owned by such Oregon Central Railroad Company or to which it may in anywise be entitled, and including all franchises of said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or the legislature of the State of Oregon." (See page 403 of transcript, Vol. I).

This offer, according to the records of the Oregon Central, was accepted on the same date it was submitted, to-wit: on the 28th day of March, 1870. (See pages 420 to 424 of transcript, Vol. I).

On pages 414 to 424 of the transcript, Vol. I, which constitutes pages 176 to 189 of the Oregon Central minute book (Complainant's Exhibit 7) an agreement between the Oregon and California Railroad Company and the Oregon Central is set out in full, which is in effect a sale of the Oregon Central to the Oregon and California Railroad Company.

On pages 421 and 422 of transcript, Vol. I (which is page 181 of the minute book or Exhibit 7) it is provided in the said agreement between the Oregon

Central and the Oregon and California Railroad Company that the Oregon Central shall sell and convey unto Oregon and California Railroad Company, party of the second part, all the railroad and other property, both personal and real, and all other rights, franchises, privileges and property of every name, nature and character.

The agreement of March 28, 1870, which is signed by Ben Holladay, C. Temple Emmet and Ben Holladay & Company, also appears upon pages 175 and 176 of said Exhibit 7 (pages 408 and 409 of the transcript), and is apparently a part of the records of the proceedings of the sale of the Oregon Central Railroad Company to the Oregon and California Railroad Company, showing that all of these transactions just referred to were consummated on the same date. Ben Holladay was the moving and controlling factor, and knew and was bound to know all that was done. The defendant is bound by his knowledge and acts.

While it is true no direct evidence has been submitted to prove the existence, execution and delivery of the agreement of March 28, 1870, the records of the proceedings of the Oregon Central Railroad Company as disclosed by the minute book, Exhibit 7, pages 175 to 187, inclusive, and appearing upon pages 390 to 424 of transcript, Vol. I, and as just referred to above, leave no room for doubt as to whether or not such agreement was executed and delivered by Ben Holladay & Company to the Oregon Central. The agreement of the same date be-

tween the Oregon Central and Oregon and California Railroad Company is conclusively proven. See Exhibit 26 (appearing upon pages 1298 to 1332 of transcript, Vol. III), which is a certified copy of the original and which was recorded in the Records of Clackamas County on April 18, 1870, showing that this agreement was in existence and that it was executed and delivered on said date. From the existence of this agreement which, in the usual order of things, was the last of the agreements above referred to, and as set out on pages 175 to 187 of Exhibit 7 (pages 390 to 424 of transcript, Vol. I), to be signed, we have a fact from which we can safely infer that the other agreements therein referred to must have been executed and delivered. A little closer examination of these proceedings will strengthen this inference. On pages 390 and 391 of transcript, Vol. I (which is pages 159 and 160 of Exhibit 7), there appears the record of a director's meeting dated March 14, 1870, at which a resolution was passed authorizing the dissolution of the Oregon Central, showing that the events recorded on pages 176 to 187 of the minute book (see pages 390 to 424 of transcript), were no doubt anticipated.

Next appears the offer of settlement made to the Oregon Central by Ben Holladay & Company, in which it was stated that the first 20 miles of railroad was completed, and that among other things provided that Ben Holladay & Company were to surrender and deliver up to the Oregon Central "all

property of every name and nature now owned or standing in the name of Ben Holladay & Company in Oregon, or in their possession, and *intended for use in and about the construction of such railroad,*" and that such property will be transferred and conveyed to said Oregon Central Railroad Company. (See pages 393 to 397 of transcript, Vol. I).

It is clear from the provisions of clause 3 of this offer just referred to, that Ben Holladay & Company intended to execute an agreement of the same character as the one referred to above and of which a copy appears to have been set out in the records of the proceedings leading up to the purchase of the Oregon Central by the Oregon and California Railroad Company. (See pages 408 and 409 of transcript, Vol. I).

It is also clear that such an agreement must have been executed before the Oregon Central Railroad Company could have executed the agreement, a copy of which appears to have been set out on pages 178 to 187 of Exhibit 7 (see pages 414 to 424 of transcript, Vol. I), for the reason that the title to practically all of the tangible property which the Oregon Central Railroad Company had thereby undertaken to convey unto the Oregon and California Railroad Company was, prior to the execution of the said agreement of March 28, 1870, as appears on pages 175 and 176 of Exhibit 7 (pages 408 and 409 of transcript) in the name of Ben Holladay & Company.

The similarity of the phraseology used in the res-

olution or offer to purchase made by the Oregon and California Railroad Company to Oregon Central; in the offer of settlement made to the Oregon Central by Ben Holladay & Company; in the agreement to convey, executed by Ben Holladay & Company, and in the agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company, with reference to the property to be transferred, furnishes strong argument in support of the proposition that all of these transactions were the work of one man, and that that one man was Ben Holladay there can be little doubt. Nothing could be more natural than the occurrence of the events as are recorded on pages 159 to 187 of Exhibit 7 (pages 390 to 440 of transcript), and to take from these records the agreement to convey of March 28th, 1870, signed by Ben Holladay & Company, as appears on pages 408 and 409 of the transcript, Vol. I, would take away the very foundation and basis upon which all the other transactions relative to the purchase of the Oregon Central Railroad Company by the Oregon and California Railroad Company rest.

The agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company of March 29th, 1870 (Ex. 26, pages 1298 to 1332 of transcript, Vol. III), is referred to and identified by Ben Holladay in his affidavit of June 22nd, 1871 (see pages 1475 to 1507, inclusive, Vol. III of transcript).

Quoting from this affidavit (pages 1486 and 1487 of transcript) :

“The said Simon G. Elliott has at this time in his possession any certificate or certificates of stock in the Oregon Central Railroad Company for any share or number of shares it is a part of said preferred seven per cent non-assessable—interest bearing stock specified as being held by said persons in Schedule “F” of Complaint and the whole thereof is as I am advised illegal and void, and the whole thereof was on the 28th and 29th days of March, 1870, legally cancelled by the stockholders and directors of said defendant the Oregon Central Railroad Company is and by virtue of the proceedings then had *and recitals from the record of which will more fully appear in the copy of deed of transfer from the Oregon Central Railroad Company defendant to the Oregon and California Railroad Company defendant in the exhibit attached to plaintiff’s complaint herein*, (referring to the suit of John Nightingale et al vs. Oregon Central Railroad Company et al) *and which copy of deed is referred to by me and made a part of this my affidavit.*”

The above extract is only one of many admissions contained in Ben Holladay’s affidavit, which establishes conclusively that he was fully informed as to all of the proceedings as are recorded upon the pages of the Oregon Central Railroad Company minute book (see pages 380 to 440 of transcript, Vol. I), connected with the execution and delivery of the agreement of March 28th, 1870.

The signing of the agreement of March 28th,

1870, by Ben Holladay & Company, wherein they agreed to convey the same property which was conveyed and transferred unto the Oregon and California Railroad Company on March 29th, 1870, naturally preceded the signing of the said agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company, and that it was signed and delivered as it appears to have been, by what is recorded upon pages 390 to 440 of transcript, Vol. I, becomes more certain when such corporate records are considered in connection with the following, towit:

THE PLEADINGS IN THE CASE OF JOHN NIGHTINGALE ET AL VS. OREGON CENTRAL RAILROAD COMPANY ET AL.

In addition to the foregoing evidence referred to as to the existence, execution and delivery of the alleged lost agreement of March 28, 1870, it appears from the pleadings in the above entitled suit that this same agreement was involved and that it was made a part of the defendants' (Oregon Central and Oregon and California Railroad Companies') answer to the bill of complaint (see page 28 of Exhibit 61, pages 1583, 1584 transcript, Vol. III), wherein it is stated that copy of the said agreement is made a part of such answer and is marked Exhibit G (a certified copy of said Exhibit G, being numbered complainant's Exhibit 61-b herein, page 1615 transcript, Vol. III).

In the same suit there appears another copy of this same agreement (see complainant's Exhibit 53 (pages 1508 to 1516 transcript, Vol. III), which is *a stipulation between the attorneys of record in the above entitled suit whereby it was agreed that an Exhibit 10 which is thereto attached, is a true copy of the original of the said alleged lost agreement, and that it was compared with the original thereof by the attorneys of record in said suit and that they were satisfied that it was a true copy.*

In paragraph 8 of Exhibit 53 and page 1511 transcript, Vol. III, it is stated that Exhibit 10 is the same as Exhibit G which is made a part of defendants' answer.

If such an alleged lost agreement was never in existence but was simply a fiction as counsel for defendant would have the Court believe, it would be rather extraordinary for it to have been referred to so many times by the parties to the above entitled cause, and especially in litigation controlled by Ben Holladay, one of the parties to that agreement, and litigation directly involving the same.

On page 4 of Exhibit 52, Ben Holladay's affidavit filed in the same suit, he refers to the minutes and various other matters which transpired at the meetings which were recorded in the minute book of the Oregon Central on March 28, 1870, (see pages 1479 to 1480 of transcript, Vol. III). In this affidavit page 1487 transcript, Vol. I, he makes special reference to the agreement recorded in such minute book (pages 180 to 200, Exhibit 7 and pages 414

to 440 transcript, Vol. I), between the Oregon Central and the Oregon & California R. R. Co. This incident, coupled with the fact that there is in the record a certified copy of this agreement of March 29, 1870 between the Oregon Central and the Oregon & California R. R. Co., (see Exhibit 26, pages 1298 to 1332 transcript, Vol. III), which was duly recorded in the County Recorder's office in and for the County of Clackamas, on the 18th day of April, 1870, as set out in the formal conveyance to the Oregon and California Railroad Company, presents to the Court facts from which there can be but one conclusion as to the existence, execution and delivery of the agreement of March 28, 1870, signed by Ben Holladay & Company, namely, that it was executed and delivered on the day and date as alleged in the bill of complaint and as it is shown to have been by the minutes of the Oregon Central R. R. Co. (pages 408 and 409 of transcript, Vol. I). In making this affidavit Ben Holladay spoke as an individual, and he is bound individually by his statements.

As has been stated hereinbefore, it would be impossible to remove the alleged lost agreement from the pages of the Oregon Central minute book without materially changing the agreement between the Oregon Central and Oregon & California R. R. Co., which appears of record on the pages immediately following the agreement between Ben Holladay & Company and the Oregon Central (pages 414 to 440 of transcript, Vol. I). That this is so becomes very apparent from a mere reading of these

agreements in the order in which they are recorded on pages from 160 to 208 of Exhibits 7. (Pages 408 to 440 transcript, Vol. I).

First: A reading of the list of the properties to be conveyed and transferred unto the Oregon Central by Ben Holladay & Co., shows that they were to convey unto the Oregon Central the following (quoting from paragraph 3 of the proposition submitted to the president and directors of the Oregon Central R. R. Co., on March 28, 1870, by Ben Holladay & Co., pages 397 to 401 of transcript, Vol. I:

“The Oregon Central railroad and telegraph lines so far as completed, together with all uncompleted portions of the same, including all rolling stock and other property belonging thereto or connected therewith, shall be surrendered up and delivered to the possession of the Oregon Central, and *all mills, machine shops, machinery, tools, implements, horses, mules, carts, oxen, live stock and all other property* of every name and description *now owned by or standing in the name of Ben Holladay & Company* in Oregon or in their possession and *intended for use in and about the construction of such railroad*, shall be transferred, conveyed and delivered to your company.”

Is there any doubt that Ben Holladay made this proposition as the controlling spirit?

This appears upon pages 399 and 400 of the transcript, Vol. I:

Second: And in accordance with the terms of the above proposition, which was accepted by the Oregon Central on the 28th day of March, 1870, (see pages 401-402 of transcript, Vol. I). On pages 411 to 414 of transcript, Vol. I (pages 176 to 180 of Exhibit 7) is set out a bilateral agreement between Ben Holladay & Company and the Oregon Central of date March 28, 1870, wherein it is provided as follows, quoting from clause 3 of said agreement on page 412 of transcript, Vol. I.

“The Oregon Central road and telegraph line so far as completed, together with all uncompleted portions of the same, including all rolling stock and other property belonging thereto *or connected therewith* shall be and is hereby surrendered up and delivered over to the possession, ownership and control of the Oregon Central Railroad Company, party of the first part herein.”

And further, clause 6, page 413 transcript, Vol. I:

“Ben Holladay & Company, party of the second part herein, shall, with even date of these presents and in consideration of the agreements herein contained, make, execute and deliver to the Oregon Central Railroad Company, party of the first part, a conveyance and transfer of *all the mills, machinery, ties and other railroad material, horses, mules, oxen, tools, implements, carts, drays, wagons, now owned by Ben Holladay and Company in Oregon and heretofore and now used in and about the construction of said railroad, together with all other property owned by or belonging to Ben Holladay & Company in Oregon.*”

Third: On pages 408 and 409 of the record (pages 175 to 176 of Exhibit 7) is set out a copy of the agreement which, by the provisions of clause 3 and 6 just above referred to, was to be executed and which is an agreement to convey unto the Oregon Central all of the property enumerated in clause 6 of the said bi-lateral agreement referred to in the paragraph just above, which reads, quoting from a part of said agreement:

“That Ben Holladay & Company do sell, assign, setover, deliver and convey unto the Oregon Central all saw mills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing tackle and all leases and all property of every name and nature now owned by or in the possession of Ben Holladay & Company, all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being *the mills*, machinery, tools, implements, live stock, horses, mules, carts, drays, wagons, gearing tackle, railroad ties, iron rails, spikes and other railroad materials *now and heretofore used by us in the construction of the Oregon Central*. It being the intention of this conveyance to transfer to the Oregon Central Railroad Company *all property, real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon.*”

Fourth: Read in connection with what has just been stated in the preceding paragraphs, the fol-

lowing, which is an extract from the contract between Oregon Central and Oregon & California R. R. Co., which was executed immediately after the execution of the alleged lost agreement appearing on pages 175 and 6 of Exhibit 7 just above referred to: pages 421, 422 transcript Vol. I.

“The said Oregon Central Railroad Company does hereby sell and agree to convey within one week from this date to the Oregon and California Railroad Company, party of the second part therein, the whole of the Oregon Central railroad and telegraph line and all the rolling stock of such road, *and also all property both real, personal and mixed now owned by the Oregon Central Railroad Company* of whatever name and nature, and all the rights of way, privileges, franchises and interest whatever, both legal and equitable, which the said corporation, party of the first part herein now has or owns, and especially all the lands, rights, privileges, emoluments and benefits whatever which the Oregon Central, party of the first part herein, now has or owns or to which it is or may be entitled, either legal or equitable, by virtue of the acts of Congress aforesaid, or either or any of them, or of any other act of Congress, or any act or resolution of the Legislature of the State of Oregon, etc.” (see page 11 of Exhibit 26), pages 1313 and 1314 transcript, Vol. III)

No argument is necessary to show that this agreement of March 28, 1870, signed by Ben Holladay & Co. agreeing to convey unto the Oregon

Central the property just enumerated and in addition thereto *all of the real property then owned by Ben Holladay & Company* in the State of Oregon, was executed and delivered for the reason that the Oregon Central would hardly have undertaken to convey property belonging to Ben Holladay & Co., to the Oregon & California R. R. Co. This is what counsel for defendant would have the court believe, however, for he contends that no such agreement as is set out on pages 175 and 176 of Exhibit 7, pages 408 and 409 of transcript, Vol. I, ever existed. When we have before the court a certified copy of this agreement of March 29, 1870, between the Oregon Central and Oregon & California R. R. Co., (See Exhibit 26, pages 1298 to 1332 of transcript, Vol. III) there can be no ground for asserting that the minute book of the Oregon Central containing the record of both of these agreements was a fiction, or that there is no evidence that any of these agreements or records were ever made. This agreement of March 29, 1870, between the Oregon Central and the Oregon & California R. R. Co. having been conclusively proven to be a reality, destroys all argument that could be produced by defendant against the verity of the records of the proceedings as is set out on pages 150 to 208 of Exhibit 7 (see pages 393 to 440 of transcript, Vol. I.

BEN HOLLADAY IDENTIFIES THE AGREEMENTS OF MARCH 28TH, 1870, AND MARCH 29TH, 1870, AND CONNECTS THEM WITH THE MATTERS AND THINGS RECORDED UPON THE PAGES OF THE OREGON CENTRAL RAILROAD COMPANY'S MINUTE BOOK.

We are not entirely dependent upon circumstantial and secondary evidence, or upon inferences to be drawn from the existence of this (Exhibit 26), to prove the existence, execution and delivery of these agreements, and to prove that the matters and things recorded upon pages 380 to 440 of transcript, Vol. I, are correct.

Quoting from page 14 of Exhibit 52, (pages 1483 and 1484 of transcript, Vol. III) which is from Ben Holladay's affidavit filed in the suit entitled, "John Nightengale et al. v. Oregon Central Railroad Co. et al.,"

"at which time and place (referring to the meeting of March 28th, 1870, see preceding sentence on page 1483 of transcript, Vol. III), the contracts between the Oregon Central Railroad Company and A. J. Cook & Co. were legally cancelled by said company and the assignees of said contracts."

An examination of the minutes of the meeting of the Oregon Central Railroad Company, (See pages 393 to 440 of transcript, Vol. I) shows that a proposition was submitted to the Oregon Central Railroad Company on the 28th day of March, 1870,

by Ben Holladay & Co. (See pages 393 to 397 of transcript, Vol. I) In clause 5 of said proposition, (page 396 of transcript) it is stated that all contracts referred to in said proposition (see page 393 of transcript) shall be cancelled by both parties. On pages 401 and 402 of transcript it is shown that the said proposition was accepted, and that the President and Secretary of the Oregon Central Railroad Company were directed to cancel said contracts in the manner prescribed in said communication. On page 413 of transcript, Vol. I, in paragraph V of a bilateral agreement, it is agreed that all of the preliminary agreements referred to upon page 410 of transcript, (Page 1 of said agreement) shall be cancelled. On pages 408 and 409 of transcript, preceding the bi-lateral agreement, is set out a copy of an agreement to convey all of the property, of every kind, then belonging to the firm of Ben Holladay & Co., in which it is again recited as follows:

“in consideration of the cancellation this date by the Oregon Central Railroad Company, at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua and Rogue River Valleys, to the California line, and the agreement of such company to pay the undersigned for all moneys laid out, expended and incurred under such contracts, to-wit, an amount not less than \$800,000.00 in U. S. Gold coin.”

Here are recitals in the copy of the alleged lost agreement in substantially the same language used by Ben Holladay in his affidavit, as above stated, to the effect that the said construction contracts were cancelled. As further evidence that Ben Holladay had in mind recitals from the agreement of March 28th, 1870, as above quoted, when referring to the proceedings of March 28th, 1870, note the following extracts from his affidavit, as appears upon page 1494 of transcript, Vol. III.

“I further state that it was for these reasons that the contracts of A. J. Cook and A. J. Cook & Co. with the Oregon Central Railroad Company were cancelled and the said Oregon Central Railroad Company was dissolved, the interest on said bonds were coming due and the Oregon Central Railroad Company had no means to meet its payment. It was therefore mutually agreed that it would be for the best interest not only of the stockholders of said company, but of all concerned the contractors as well—to cancel said contracts, thereby relieving both the company and the contractors from an embarrassing position.”

It would have been rather unusual for Ben Holladay to have made so many apt references to the recitals contained in this copy of agreement of March 28th, 1870, set out upon pages 408 and 409 of transcript, Vol. I, (Pages 175 and 176 of Exhibit 7), and to the matters and things appearing upon the pages immediately preceding, and immediately following the pages upon which this agreement is recorded, had he not been familiar with

the contents thereof, and had he not fully understood the purpose and effect of such agreement and proceedings. *Had he not actually participated in the making of this agreement, and in the proceedings incident to the making thereof, he could not have so aptly referred to same in his affidavit.*

III.

WERE THE GRINDLEY AND ELLIOTT TRACTS INCLUDED IN THIS AGREEMENT BETWEEN BEN HOLLADAY & COMPANY AND THE OREGON CENTRAL, OF DATE MARCH 28TH, 1870.

The language used in all of the agreements and other transactions leading up to the signing of the agreement between the Oregon Central and the Oregon and California Railroad Company as appears on pages 159 to 187 of Exhibit 7 (pages 390 to 440 of transcript) is very general in character and does not specifically describe any real property, and the question naturally arises, what evidence is there that it was the intention of the parties to include in the agreement of March 28, 1870 between Ben Holladay & Company and the Oregon Central, the Grindley and Elliott tracts?

In addition to the argument furnished by the writings themselves, there are other circumstances when considered in connection with these writings which leaves no room for doubt that they were so included.

First, let us examine the terms of these writings with a view of ascertaining therefrom some evidence that these lands were included. In clause 3 of the offer made to the Oregon Central by Ben Holladay & Company, and which was accepted by the Oregon Central (see pages 399 to 401 of transcript, Vol. I) Ben Holliday & Company agrees to transfer unto the Oregon Central all property of every name and description now owned by or standing in the name of Ben Holladay & Company in Oregon or in their possession and intended for use in and about the construction of such railroad. This statement is certainly broad enough in terms to include the Gridley and Elliott tracts.

In the offer made to the Oregon Central by the Oregon and California Railroad Company the same general terms appear again. (see page 403 of transcript, Vol. I). It is here stated that Ben Holladay, the President of the Oregon and California Railroad Company is authorized to negotiate for the purchase of, in addition to the portions of the Oregon Central railroad which has been completed and in process of construction, "all the property, real, personal and mixed now owned by such Oregon Central or to which it may in anywise be entitled, and including all franchises of the said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or of the legislature of the State of Oregon, or in any way".

From this language it is clear that Ben Holladay,

who was the main figure in all of these transactions, knew that the firm of Ben Holladay & Company had purchased the Grindley and Elliott tracts for the use and benefit of the Oregon Central and that they were lands the Oregon Central would own (after the execution of the agreement of March 28, 1870 by Ben Holladay & Company), in addition to its right of way and the lands to be given by the United States Government in aid of the construction of such road. This explains to some extent the reason for stating in such offer that in addition to the franchises of the Oregon Central and the lands which may be acquired from the United States, that the offer included all other property, real, etc. There can be no mistake in assuming that this statement had reference to the Grindley and Elliott tracts and that they were contemplated in making such offer, is supported by what follows.

On pages 408 and 409 of the transcript, Vol. I, is set out a copy of the agreement of March 28, 1870, and which is an agreement upon which the complainant relies in part to support its claim to the property involved in this suit. What reason can be given for the use of the following terms: "It being the intention of this conveyance to transfer to the said Oregon Central Railroad Company all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon" (see page 409 of transcript, Vol. I). if it were not the purpose of this

agreement to convey unto the Oregon Central the Grindley and Elliott tracts.

That it must have been the Grindley and Elliott tracts that were intended to be conveyed in addition to the lands to be acquired in the State of Oregon and from the Federal Government, is proven beyond reasonable doubt by the words of Ben Holladay under oath in his deposition taken in the trial of the dissolution suit entitled, Ben Holladay et al. vs. S. G. Elliott et al. In answer to the following question: "State fully all of the property owned by the firm of Ben Holladay & Company at the date of the commencement of this suit", he replied: "Aside from the contracts which the firm of Ben Holladay & Company had with the Oregon Central the firm had nothing except two saw mills and a small machine shop, also some personal property". (see page 6 of Exhibit 47 see page 1392 transcript, Vol. II)

On pages 2 and 3 of Exhibit 46 (pages 1387-1388 transcript, Vol. III) (which is an extract from the deposition of Ben Holladay taken on the 27th day of December, 1870, and prior to the taking of the deposition just above referred to), in answer to the question: "Have you purchased any property in Oregon since the 12th day of September, 1868", he replied: "I have purchased about 250 or 260 acres of land in East Portland".

It is urged by counsel for the defendant that the statement of Ben Holladay that the firm of Ben Holladay & Company owned nothing except the

contract with the Oregon Central and some items of personal property in answer to the question referred to above and as appears on page 6 of Exhibit 47, is conclusive that the Grindley and Elliott tracts were not the property of the firm of Ben Holladay & Company, but of Ben Holladay individually.

This deposition, however, (Exhibit 47, page 6) see page 1392 transcript, Vol. III, was taken on the 3rd day of April, 1871, several months after the firm of Ben Holladay & Company had agreed to convey unto the Oregon Central all of its property, and no doubt at the time the question was asked Ben Holladay he answered it in view of the changed circumstances, and that his object at this time was to show that the firm of Ben Holladay & Company had no assets of any consequences to be divided upon a final decree being entered in the said dissolution suit. That this must be so, is evidenced by his prior statements in the deposition taken on December 27, 1870, wherein he stated just what property he had purchased since the 12th day of September, 1868. If he, at this time, intended to claim the Grindley and Elliott tracts he no doubt would have stated in answer to this question, to wit, "what property have you acquired or purchased in the State of Oregon since the 12th day of September, 1868," that he had purchased the said Grindley and Elliott tracts in addition to the other property named in answering this question.

This deposition was taken a few months after

the firm of Ben Holladay & Company had signed the agreement of March 28, 1870, by which it is claimed by the complainant, the firm of Ben Holladay & Company agreed to convey the Grindley and Elliott tracts to the Oregon Central.

If the Grindley and Elliott tracts were acquired as is evidenced by Exhibits 40 and 42 (pages 1355 to 1362 transcript, Vol. III) on the 4th day of May, 1869, and October 5th, 1869, respectively, or subsequent to the 12th day of September, 1868—directing these circumstances to the point in hand—where did the title to the Grindley and Elliott tracts stand at the time Ben Holladay & Company signed the agreement of March 28, 1870? We have apparently conflicting evidence from the mouth of the only person who knew better than any one the real facts. We do have, however, the deeds themselves from Grindley, (Exhibit 40) and from Elliott (Exhibit 42), conveying these lands unto Ben Holladay & Company, to support complainant's contention that when Ben Holladay stated in answer to interrogatories 1953 and 55, (Exhibit 46, pages 2 and 3) (pages 1387-1388 transcript, Vol. III) that he had not purchased any lands except about 260 acres of land in East Portland since September 12, 1868, that he knew then that the Grindley and Elliott tracts were not purchased by himself but that they were purchased by the firm of Ben Holladay & Company for the use of the Oregon Central and that they were a part of the property to be conveyed to the Oregon Central by the said agreement of March 28, 1870.

If, as is contended by counsel for the defendant, Ben Holladay & Company did not on the 28th day of March, 1870, own the Grindley and Elliott tracts, what other real property could have been referred to in this agreement?

If Ben Holladay stated the truth when he said in answer to interrogatory 22, as appears in Exhibit 47, page 6, (page 1392 transcript, Vol. III) that the firm of Ben Holladay & Company did not own any real property on the date the dissolution suit was commenced (November 5, 1869), which was prior to the execution of the agreement of March 28, 1870, what other real property did Ben Holladay & Company have in mind when they used the following terms: "It being the intention of this conveyance to transfer to the Oregon Central Railroad Company all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon"? (See page 409 of transcript, Vol. I). They did not acquire any lands from the Oregon Central on September 7, 1869, when taking over certain property of the Oregon Central as security for the building of the railroad. All that was transferred to Ben Holladay & Company by this agreement was the stock and bonds of the said Oregon Central. Any real property that Ben Holladay & Company could have had in mind must necessarily have been such as was acquired by them in connection with the building of the road, and that it was the Grindley and Elliott tracts must be very clear from what has been stated above.

According to the theory of the defendant, the title to these lands could not have vested in either Ben Holladay or Ben Holladay & Company at the time deeds were executed by James Grindley and Gardner Elliott, for the reason that Ben Holladay states that Ben Holladay & Company did not own it (see Exhibit 47, page 6, Interrogatory 22 and Answer thereto, page 1392 transcript, Vol. III), and that he himself did not own it (see Interrogatories 1953 and 1955 and answers thereto, Exhibit 46, pages 1387 and 1388 transcript, Vol. III). Such a conclusion was hardly possible in view of the evidence in the record, especially Exhibits 41 and 42, (pages 1355 to 1362 transcript, Vol. III), which show that the lands in dispute in the case before the court were conveyed unto Ben Holladay & Company.

The foregoing facts would be sufficient in themselves to identify these lands with the contract of March 28, 1870, even if there were no other circumstances to aid the court in reaching such a conclusion. These facts also tend strongly to prove the execution and admitted existence of the contract of March 28, 1870. They clearly estop Ben Holladay and his successors in interest, or his heirs or devisees, to deny such contract.

From the testimony of Samuel Wishard, as appears on pages 110 and 111 of transcript, Vol. I, it appears that he made an investigation of the lands immediately prior to giving testimony in this suit, at the request of Mr. Fenton, and from this

investigation was able to locate the lands and the saw mills which were erected thereon by Ben Holladay & Company from blue prints which were offered in evidence as Complainant's Exhibit 2. Here we have primary evidence of one who had knowledge of the location of these lands, to the effect that they are the Grindley and Elliott tracts and the same lands which the complainant claims the firm of Ben Halladay & Company agreed to convey unto the Oregon Central on the 28th day of March, 1870. Other circumstances which tend to show that the Grindley and Elliott tracts are the same lands referred to in the agreement of March 28, 1870, and as appears from the testimony of witnesses who had knowledge of same, is the existence of a diagonal road which appears to have been located on the Elliott tract and was used during the time the mills of Ben Holladay & Company were in operation in hauling ties therefrom to the Oregon Central railroad.

See the testimony of A. M. Elam (page 91 of transcript Vol. I), where witness was shown complainant's Exhibit 2, (which purports to be a plat of the Elliott tract), and pointed out the location of this road, and that it was a road used when hauling ties to the railroad.

A. N. Wills testified (pages 202 and 203 of transcript Vol. I) substantially to the same effect.

These circumstances in connection with the matters referred to hereinbefore when calling the Court's attention to the testimony of these wit-

nesses relative to the removal of timber, etc., from these tracts, show beyond a doubt that the Grindley and Elliott tracts were the lands which are the subject of controversy in this suit and which were intended to be conveyed by the agreement of March 28, 1870.

The dissolution suit entitled "Ben Holladay and C. Temple Emmet vs. S. G. Elliott, further evidences that these lands in dispute were included in the agreement of March 28th, 1870.

This suit was commenced on or about the 5th day of November, 1869, prior to the execution of the agreement of March 28, 1870, and was not finally determined until August 15, 1879, nearly ten years after the suit was begun, and over nine years after the contract of March 28th, 1870, was made. The purpose of this suit was to wind up the affairs of Ben Holladay & Company, co-partnership, and to have an accounting and settlement among the members of such firm. In these proceedings no mention or claim was made by anyone connected with the firm of Ben Holladay & Company that the Grindley and Elliott tracts were a part of the assets of the firm of Ben Holladay & Company. No mention or claim was made with reference to these lands, either in the pleadings or in the findings of the court. Exhibit 23 constitutes the findings of the Supreme Court of the State of Oregon, dated August 15, 1879, (see pages 1172 to 1183 of transcript, Vol. III). These findings no doubt were

based upon certain facts presented to the court, and had there been any evidence submitted in this suit tending to show that the Grindley and Elliott tracts were a part of the assets of the firm of Ben Holladay & Company, the court would have made a finding accordingly. The decree and findings constitute an adjudication that Ben Holladay & Company did not own these lands, binding on each member of the firm.

Furthermore, it is fair to presume that had it not been the intention of the firm of Ben Holladay & Company to convey these tracts to the Oregon Central by the agreement of March 28, 1870, they would have been claimed by some member of the co-partnership at some time prior to the final determination of this dissolution suit so that the court could have decreed in what proportion and in what manner they should go to the members of the firm of Ben Holladay & Company.

It is contended by the defendant that the only reason no claim was made by any members of the co-partnership of Ben Holladay & Company to these lands was that it was generally understood and known that the deeds from Grindley and Elliott were never intended to convey the title to the co-partnership but were intended to convey the title thereto to Ben Holladay individually. The deeds themselves negative any such conclusion, and without rehearsing the other circumstances connected with the purchase of these lands by the firm of Ben Holladay & Company, we submit that there is no

merit in defendant's contention. Besides the findings and decree were binding upon Ben Holladay, C. Temple Emmet, and S. G. Elliott, as *individuals* also.

Before proceeding further, complainant will now consider the exceptions submitted by defendant to the introduction of Exhibits 21, 23, 24, 46, 7 and 8.

These exhibits are part of the pleadings in the suit entitled, Ben Holladay, et al, v. S. G. Elliott et al, for an accounting and dissolution of the co-partnership of Ben Holladay & Company. The first objection of the defendant is that these exhibits are incompetent, irrelevant and immaterial.

Complainant contends that the absence of any reference to the Grindley and Elliott tracts in this dissolution suit, or the failure of any member of the firm of Ben Holladay & Company to make any claim to these lands in such proceeding, is a circumstance which, when considered in connection with other evidence in the record and to which the Court's attention has just been called, tends to prove that it was the intention of Ben Holladay & Company when executing the agreement of March 28, 1870, to include within its terms an agreement to convey to the Oregon Central the Grindley and Elliott tracts.

“Evidence is relevant which tends to raise the presumption of the existence or non-existence of the fact in issue, as by proving facts other than the fact in issue, which by experience have been found to be so closely associated

with the fact at issue as to render its existence or non-existence more or less probable.”

U. S. v. Searcey, 26 Fed. 435;

Wells v. Fairbank, 5 Tex. 582.

“It is not necessary, however, that it should itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant.”

Elliott on Evidence, Sec. 144, and cases cited under note 6.

“It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable.”

Wharton on Evidence, Vol. 1, Sec. 21.

Furthermore, Exhibits 46 and 47 are depositions in the said suit, and it is only necessary to call the Court's attention to interrogatories 1953 and 55 of Exhibit 46 (pages 1387, 1388 transcript, Vol. III) and the answers thereto, also interrogatory 22 and the answer thereof of Exhibit 47 (page 1392 transcript, Vol. III), which show that they directly bear upon one of the main issues in the suit at bar, towit, whether or not the Grindley and Elliott tracts were property of the firm of Ben Holladay & Company upon the date of the commencement of the said dissolution suit.

A further objection to these exhibits on the part of the defendant is that they are pleadings in another and different suit between other and different parties and that they involve other and different subject matter and issues.

“And the general doctrine is that the declarations of a party to the record or of *one identified in interest with him*, are as against such party admissible in evidence. *The law in regard to such source of evidence looks chiefly to the real parties in interest*, and gives to their admissions the same weight as though they were parties to the record.”

Greenleaf on Evidence, Secs. 171, 180, Vol. I, 5th Ed.

Fickett v. Swift, 41 Me. 65, 68.

The foregoing general rule is one usually applied where an action or suit is prosecuted in the name of another.

An examination of the exhibits numbered 21, 23, 24, 46, 47 and 48, as appear upon pages 1155 to 1214 inclusive, and upon pages 1385 to 1406 inclusive, respectively, shows that Ben Holladay was not only a party to the record, but was the principal party in interest.

“The affidavits and depositions of a party are of course competent to show his admissions, although used in another suit, and from their solemn character are entitled to great weight.”

Jones on Evidence, Pocket Ed., Sec. 274, note 72

“Admissions set forth in pleadings, even though in another action, are admissible against a party in another and different action with other parties, if it be shown that such admissions were made with his knowledge or sanction or by his direction.”

Cook v. Barr, 44 N. Y. 156

“The admissions of a party to a fact wherever or however made, are evidence against him even though they may be found in an answer as a bill in chancery, when pertinent to the questions involved in the case on trial.”

Robbins v. Butler, 24 Ill. 388

Hayman v. Wheeler, 29 Fed. 347

“Pleadings verified by a party, or drawn under his special instructions and which raise an issue of fact, are admissible in evidence against him in other cases, *whether between the same parties or not.*”

Elliott on Evidence, Sec. 237, Vol. I

Pope v. Allis, 115 U. S. 368

The defendant herein being an heir of Ben Holladay is bound by admissions he may have made during his life time which would affect the legal title to the lands in dispute.

“Admissions made by an ancestor affecting the legal title to real property, are admissible in evidence against an heir of such ancestor in a suit brought by the grantor of such ancestor to quiet title to such property.”

Elliott on Evidence, Sec. 267, Vol. 2

Chadwick v. Fournier, 69 N. Y. 404

Defendant also objects to these exhibits being introduced for the reason that they are not properly authenticated or identified.

All of these exhibits are certified copies of the originals, being certified by J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, under

the seal of the said court. It is not necessary to cite any authorities to the effect that these exhibits are properly authenticated. See further, the testimony of J. C. Moreland (pages 864 to 897 of transcript, Vol. II), who identified these exhibits on the witness stand on behalf of the complainant.

The objections of the defendant that there has been no foundation laid for the introduction of these exhibits is to be considered in connection with the evidence tending to show that the agreement of March 28, 1870 has been lost and that reasonable search has been made and that it could not be located. As admissions, however, they are competent even though the execution or loss of the agreement of March 28, 1870, be not proven. These admissions constitute primary evidence.

TAXES WERE PAID ON THESE LANDS BY THE OREGON & CALIFORNIA RAILROAD COMPANY WITH BEN HOLLADAY'S KNOWLEDGE AND CONSENT.

Another significant fact and one which adds considerable weight to the complainant's contention that these lands were intended to be conveyed to the Oregon Central by Ben Holladay & Company on March 28, 1870, is the fact that the record shows that Ben Holladay was the President and *principal stockholder* of the Oregon and California Railroad company from the *year 1870 until the year 1876*; that during this time, beginning with the year 1873

until 1876, the evidence shows that the taxes were paid on the Grindley and Elliott tracts by the Oregon and California Railroad Company. (See Exhibits 66 and 67), with the exception of the year 1877. He must have known that the Oregon and California Railroad Company was paying these taxes and claiming to own the lands.

It is hardly probable that Ben Holladay, being the principal stockholder and presiding officer of the Oregon and California Railroad Company, did not know that the company was paying the taxes on these lands. He was bound to know who paid these taxes, if he was himself the owner.

The court is referred to pages 490, 491 and 492 of the transcript, Vol. I, showing that Ben Holladay was one of the incorporators of the Oregon and California Railroad Company; also that he was a director and president of the company. On pages 513 and 514 the transcript, Vol. I, shows that he was the owner of \$13,499,600.00 worth of stock of the total of \$20,000,000.00 for which the company was capitalized. On page 569 the transcript, Vol. II, shows that he was on that date, to wit, the 9th day of April, 1872, the owner of the same amount of stock and that he was still president of the company. This is further shown on pages 592 and 593 of the transcript, Vol. II.

On pages 614 and 615 appears the record of a meeting dated April 19, 1876, whereat Ben Holladay tendered his resignation as president and

director of the company, and on pages 624 and 625 transcript, Vol. II, following there is recorded a copy of an agreement whereby Ben Holladay transferred the controlling interest of the Oregon and California Railroad Company to the bond holders.

Had it not been the intention of Ben Holladay when signing the agreement of March 28, 1870, to have conveyed the Grindley and Elliott tracts unto the Oregon Central, he certainly would not have allowed the Oregon and California Railroad Company to pay the taxes on these lands for the years above named. And furthermore, he would no doubt have been sufficiently interested had he still claimed the title to these lands, to have looked into the fact as to whether or not the taxes were being paid, and in this way could have discovered that they were being paid by the Oregon and California Railroad Company if he did not know it by reason of his connection with the said Company.

The above facts being matters referred to in complainant's Exhibit 14, (as appears on pages 484 to 537 transcript, Vol. I; 528-667, Vol. II) which is the minute book of the Oregon and California Railroad Company, it will be proper at this time to consider certain exceptions of defendant to the introduction of this minute book in evidence.

Defendant contends that this minute book of the Oregon and California Railroad Co. is incompetent, irrelevant and immaterial and is not the best evidence of any deed or other agreement upon which the complainant relies as

conveying the title to the Grindley and Elliott tracts unto the Oregon Central Railroad Company.

Complainant's purpose in offering certain portions of this minute book at this time is to show that Ben Holladay was a director, also president of the Oregon and California Railroad Company, and that he was the principal stockholder and as such must have been familiar with the fact that the complainant was paying the taxes on these lands. It is a fact from which an inference may be drawn that he must have known what land the Company owned and upon what lands the Company was paying taxes and whether or not they owned all of the lands upon which they were paying taxes.

“Evidence tending to show the relation of the parties and the circumstances surrounding the transaction is relevant.”

Caldwell v. Adams, 51 Mich. 491.

“When a fact in evidence necessarily accompanies the facts at issue it raises strong presumption of the existence of the fact sought to be proved. If such fact ordinarily accompanies the fact at issue it raises a probable presumption of the existence of the fact sought to be established, but if the fact sought to be admitted as evidence only occasionally accompanies the fact at issue, it raises only a very slight presumption, but even then it may, in connection with other relative and consistent facts and circumstances be admitted as an element in circumstantial evidence.”

U. S. V. Searcey, 26 Fed. 435

“As a general rule it may be said that any evidence which tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant.”

Holman Ins. Co., v. Weide, 11 Wall (U. S.)
438

Elliott on Evidence, Sec. 144, Vol. 1.

The further objection to the introduction of Exhibit 14 that no foundation has been laid, is to be considered in connection with the exceptions to the introduction of Exhibit 7.

It is further claimed that Exhibit 14 has not been properly authenticated or identified.

This minute book was identified by Mr. R. Koehler, one of the witnesses called for the complainant. On pages 692 and 693 of transcript, Vol. II, this witness testifies that he knew Mr. A. C. Cunningham who was secretary of the company at the time the records appearing on pages 6 to 9 were made; that he recognized the signature of Mr. Cunningham, who is not now living; also recognized the signature of Ben Holladay, deceased, appearing upon the same page, who signed certain records therein as president of the Oregon & California Railroad Company.

Also see the testimony of L. F. Steel (pages 489 and 490 of transcript, Vol. I), who identifies Exhibit 14 as a journal of minutes No. 1 of the Oregon & California Railroad Company.

It appears from page 489 that it was admitted by the parties herein, generally that any and all books which Mr. Steel has produced here are part of the Secretary's books of the Oregon & California Railroad Company.

At another place hereinafter, it will be shown that Exhibit 14 when tested by the rules of evidence relative to the identification of records, has been sufficiently identified to be admitted.

ANOTHER INCIDENT TENDING TO SHOW THAT IT WAS THE INTENTION OF BEN HOLLADAY & COMPANY and BEN HOLLADAY PERSONALLY IN SIGNING THE AGREEMENT OF MARCH 28, 1870, TO CONVEY THE LANDS IN DISPUTE HERE TO THE OREGON CENTRAL IS, THE FAILURE OF THE HEIRS OF BEN HOLLADAY TO MAKE ANY CLAIM TO THESE LANDS AT THE TIME HIS ESTATE WAS ADMINISTERED.

From Exhibit 25, (set out on pages 1214 to 1298 transcript, Vol. III), which is a record of the probate proceedings of the last will and testament of Ben Holladay, deceased, we find,

First: That a will was made by Ben Holladay on September 7, 1875 (see pages 1219 and 1220 transcript, Vol. III), and that Ben Holladay died on the 8th day of July, 1887 (see page 1215 of transcript). On page 1227 of transcript, Vol. III, appears the oath of Joseph Holladay, the executor

of the estate of Ben Holladay, (a brother of Ben Holladay,—see page 106 of the transcript, Vol. I), that the annexed inventory contained a true statement of *all the real and personal property of Ben Holladay, deceased.*

Second: An examination of this inventory fails to disclose any record of the Grindley and Elliott tracts. Further, the probate proceedings fail to show that any claim was made by the executor of the last will of Ben Holladay to these lands.

It is fair to presume that Joseph Holladay being a brother of Ben Holladay, would have known whether or not Ben Holladay claimed any interest in these lands. This circumstance in addition to the absence of any evidence in the record on behalf of the defendant to show that any claim has been made since the settling up of the estate of Ben Holladay by any of the heirs or representatives of Ben Holladay, deceased, to these lands, negatives the contention of the defendant that these lands were a part of the estate of Ben Holladay and that they passed to the defendant herein by reason of the residuary clause contained in said will.

Defendant objects to the introduction of Exhibit 25 as being incompetent, irrelevant and immaterial and as not being the best evidence, and because no foundation has been laid to introduce same as secondary evidence of the existence of the agreement of March 28, 1870.

The complainant will at this time consider only

the competency, relevancy and materiality of Exhibit 25.

The point claimed by complainant for the introduction of Exhibit 25, which constitute the probate proceedings of the last will and testament of Ben Holladay, is that it is one of the circumstances which tends to prove one of the main issues raised by the pleadings, to-wit, that when Ben Holladay signed the agreement of March 28, 1870, it was his intention to convey the Grindley and Elliott tracts to the Oregon Central. Had it been otherwise, it is reasonable to conclude that Ben Holladay would have had some record of these lands and that they would have been claimed by his executors when settling up the estate, and that they would have appeared somewhere in the list of property included in the appraisement. It is a fact which the Court may consider not as being sufficient in itself to prove that such was the intention of Ben Holladay to convey the said lands to the Oregon Central, but in connection with other circumstances tends to establish that such was the intention of Ben Holladay when signing this agreement of March 28, 1870.

Elliott on Evidence, Secs. 21 and 22, Vol. 1.
Wharton on Evidence, Sec. 21, Vol. 1.

These are public records, required by law to be made, and they are when duly certified, competent evidence tending to prove that Ben Holladay at his death did not own these lands in dispute, that he had prior to his death disposed of the same, and

that such disposition was made by the agreement of March 28th, 1870, or some other grant. The evidence is competent, but not conclusive.

FRANKFORT COMMITTEE AGREEMENT

In the execution of the above agreement by Ben Holladay on the 29th day of February, 1876, we have another instance which goes far in establishing the fact that Ben Holladay did not claim to own the lands in dispute after the signing of the alleged lost agreement of March 28, 1870, thereby implying that they had been theretofore conveyed or intended to be conveyed to the Oregon & California Railroad Co. or its predecessor, the Oregon Central Railroad Company.

In clause 8 of this agreement, as appears upon pages 194 and 195 of Exhibit 14 (pages 1031 and 1032 of transcript) Ben Holladay agreed as follows, quoting a part of paragraph 8:

“And said Holladay further covenants and agrees for himself and his heirs and legal representatives, that he will on demand, either convey to the Oregon & California Railroad Company, to the Oregon Central Railroad Company, to the Oregon Steamship Company and to the Portland Warehouse & Dock Company, or to any of them, or else, as the case may be, will take necessary legal proceedings in conjunction with said companies or any of them, for the purpose of completing the transfer to said companies or any of them, or any real

estate or other property or rights which equitably belongs to the said companies or any of them (if any such rights or property there be) or which may now be held by or standing in the name of Ben Holladay or any other person or persons or corporations in trust, having been purchased for said corporations or conveyed to them for their use."

In view of what has been related hereinbefore, showing that the Oregon Central had agreed to pay unto Ben Holladay & Company approximately \$800,000.00 to reimburse them for expenditures made in building its road (see pages 59 and 60 *supra*), how can it be said that the Grindley and Elliott tracts did not equitably belong to the Oregon and California Railroad Company at this time by virtue of the deed of March 29, 1870, entered into between the Oregon Central and the Oregon & California Railroad Company?

We have hereinbefore shown beyond any question that the Grindley and Elliott tracts were purchased for no other purpose than for use in the construction of the Oregon Central railroad, and in this connection it is to be remembered that these agreements between Ben Holladay & Co.. and the Oregon Central, and the agreements between the Oregon Central and the Oregon & California R. R. Co., do not describe any real property to be conveyed thereby in specific and definite terms. In both of these agreements it appears to be a matter of one man dealing with himself through corporations. We have shown that Ben Holladay was the

principal owner of Ben Holladay & Company (see Exhibit 24, page 1, page 1184 transcript, Vol. III) and that he held the controlling interest of the Oregon Central at the same time this alleged lost agreement was executed (see Exhibit 26, bottom of page 15 and top of page 16, page 1318 transcript, Vol. III), also Exhibit 52, page 3, (page 1476 transcript, Vol. III) and that he organized the Oregon & California R. R. Co., and took the initiative in acquiring for the latter company all of the properties formerly owned by the Oregon Central and Ben Holladay & Company (see pages 403 and 404 of transcript, Vol. I).

We find that at the time the Frankfort Committee agreement was entered into, that Ben Holladay was the owner and holder of a majority of the stock of the Oregon & California R. R. Co. In clause 2 of this agreement (see page 192 of Exhibit 14—page 1028 of transcript, Vol. II) he agrees to the following:

“Second: The said Holladay in like manner sells and transfers and agrees to sell and transfer to the said parties of the second part, or to such persons as they may designate, the majority of the Oregon & California Railroad Company stock, namely, over 25,000 shares thereof, the remaining being held by M. S. Latham and others.”

See also pages 84, 5 and 6 of Exhibit 14 (pages 555 and 556 of the transcript, Vol. I) showing that Ben Holladay held a majority of the stock of the Oregon & California R. R. Co.

Up to the time this agreement was entered into, there was apparently no one sufficiently interested in these matters to secure formal deeds from Ben Holladay for lands which were intended to be conveyed by the agreement of March 28, 1870 (the alleged lost agreement) to the Oregon Central, and in turn conveyed by the Oregon Central to the Oregon & California R. R. Co., on the day following.

It may be argued that if it was the purpose of this agreement to have further assured the Oregon & California R. R. Co. that Ben Holladay would execute deeds to such property as equitably belonged to it, that it would have been a simple matter to have secured deeds to these lands at this time instead of accepting this contract of assurance.

It appears that Ben Holladay at the time the Frankfort Committee agreement was entered into, was in Washington, D. C. (see page 614 of transcript, Vol. II), and that the agreement was signed by H. Hampton, his attorney in fact (see page 640 of transcript, Vol. II). It would not be unreasonable to conclude that at the time this Frankfort Committee agreement was entered into, none of the persons present were informed in detail as to what lands stood in the name of Ben Holladay & Company and which were intended to be conveyed by the agreement of March 28, 1870 (the alleged lost agreement), and for that reason did not and could not secure a deed.

It appears from the minutes of the meeting on pages 614 to 617 of transcript, Vol. II, that this

Frankfort Committee agreement which is dated February 26, 1876, was not executed by the parties until about the 18th day of April 1876. (See pages 696, 697 transcript, Vol. II.) That this is correct see the testimony of R. Koehler, who states that he was present at this meeting and remembers that this agreement was submitted at this time by Mr. Henry Villard. See page 696, 697 transcript, Vol. II, where he states, in substance that this agreement was signed on the 19th day of April, 1876 by Mr. Henry Villard, attorney in fact for the Committee, and by Ben Holladay by H. Hampton, Ben Holladay's attorney in fact. Also stated that at this time Ben Holladay was in Washington, D. C. (See page 697 transcript, Vol. II.)

Another reason why it was possible that a deed could not have been secured at this time is, on this same date Ben Holladay was retiring as officer and director of the Oregon & California R. R. Co. It appears that the Company was having trouble with Mr. Holladay, (See top of page 696 transcript, Vol. II) who was still in control of the Company at this time, and that it was the desire of other members of the Company to adjust these difficulties by buying Mr. Holladay's interest. From this there appears to be a good and sufficient reason why the Oregon & California R. R. Co. could not safely ask Mr. Holladay for a deed to these lands for the reason that their so doing could have been construed as admitting that the lands in dispute in this cause before the Court and any others that had

not been specifically described, did not belong to the said Oregon & California R. R. Co., and that they were not intended by the parties to the agreement of March 28, 1870 (the alleged lost agreement) to be so conveyed.

That Ben Holladay did at this time dispose of his interest in the Oregon & California R. R. Co., see pages 624, 625 of the transcript, Vol. II. (page 192 of Exhibit 14, paragraph 2).

This Frankfort Committee agreement and all proceedings connected therewith appear upon pages 612 to 662, inclusive, of the transcript, Vol. II.

IT HAS BEEN THE PURPOSE OF COMPLAINANT UP TO THIS POINT TO CALL THE COURT'S ATTENTION TO CERTAIN MATTERS OF EVIDENCE IN THE RECORDS WHICH, AS COMPLAINANT BELIEVES, FULLY ESTABLISHES THE FOLLOWING FACTS:

FIRST: That the agreement of March 28, 1870 (the alleged lost agreement) in which Ben Holladay & Company and Ben Holladay agreed to convey unto the Oregon Central the lands in dispute, did exist, and that it was executed and delivered on the day and date as alleged in paragraph 8 of bill of complaint.

SECOND: That notwithstanding the fact that these lands were not specifically described, it was

the intention of Ben Holladay & Company when executing this agreement to agree to convey them unto the Oregon Central, and that under the proofs these lands have been identified as covered by the words of general description. That is certain which can be made certain.

THIRD: That the lands in dispute were purchased by Ben Holladay & Company primarily, for the use and benefit of the Oregon Central and that they were used in aid of the construction of the first 20 miles of railroad for the said Oregon Central Railroad Company.

FOURTH: That the lands described in Exhibits 41 and 42 and hereinbefore referred to as the Grindley and Elliott tracts, are the same lands upon which said Ben Holladay & Company located their saw mills and the same from which they removed timber for ties and bridge timbers, and are the same lands referred to by Ben Holladay & Company when using the following terms in the agreement of March 28, 1870: "It being the intention of this conveyance to transfer to the said Oregon Central Railroad Company all property, real and personal, of every name and nature *now owned or possessed by the undersigned in the State of Oregon*".

IV.

IS COMPLAINANT'S EVIDENCE PROPERLY
BEFORE THE COURT?

It is urged by counsel for the defendant that certain matters of evidence are not properly before the Court. Complainant has considered a part of these objections hereinbefore when discussing certain exhibits and does not believe it will be necessary to give them any further consideration, as it has been shown that for the purposes referred to hereinbefore they are clearly competent and relevant to the issues raised by the pleadings.

The matters of evidence which seem to have caused counsel for the defense the most trouble are Exhibit 7 (Oregon Central minute book), and Exhibit 14 (Oregon & California minute book); also Exhibits 51, 52, 53, 61-a-b & c (the letters a-b-c were added by counsel for complainant for convenience, they were all numbered the same), which are the pleadings in the suit entitled John Nightingale et al. v. Oregon Central R. R. Co. et al.

Considering first the objections to Exhibit 7: It appears that the principal objection to the introduction of this minute book is that it is self-serving evidence, as being private entries relating to the private business of the Oregon Central R. R. Co. made for its own use and benefit without the knowledge or consent of the defendant or her predecessor.

If it were not for the fact that the minutes of the Oregon Central as are recorded upon pages 160

to 208 (383 to 440 of transcript, Vol. I), are so closely connected with and related to the alleged lost agreement, and further, if it were not so clearly shown that Ben Holladay was the principal party in interest in all the various transactions leading up to his signing of the alleged lost agreement, and was a stockholder and participant in the very transaction itself, there would be some cause for giving this objection consideration. Ben Holladay was not a stranger within the meaning of the rule denying the competency of corporate records. The court, however, must examine these pages before it can decide whether or not they are to be excluded. After so doing it will be clear that Ben Holladay was present at the meetings of the stockholders and directors of the Oregon Central R. R. Co. as are recorded upon the pages above referred to, and that he was in control of and directed the whole proceedings. If this is so, why should these records be, in a court of equity, considered as self-serving evidence? That they are not will be presently shown. He had not only an individual interest in the transaction, and contracted and participated as such, but he was the acting majority stockholder.

It is to be borne in mind that the minute book (Exhibit 7) is not the only evidence offered by complainant to establish the existence, execution and delivery of the alleged lost agreement. It is only one parcel of evidence to be considered in connection with other facts and circumstances herein-

before referred to, which the Court may consider as one of the links of the chain of circumstances which tends to prove the existence, etc., of the said agreement. After so considering, it is for the Court to decide whether or not Exhibit 7 is to be excluded.

Furthermore, it seems to be the idea of the defendant that when complainant introduced Exhibit 7 it was introduced solely to show the copy of the alleged lost agreement. If this were true it would have been a simple matter to have introduced pages 175 and 176 of said minute book separately. This book, however, was introduced to show other circumstances connected with the execution of the alleged lost agreement which tended to prove that such an agreement as is set out in paragraph 8 of the bill of complaint (See pages 7 and 8, 9 transcript, Vol. I.) (and alleged therein to be a copy of an original bearing same day and date) did in fact exist, and that it was duly executed and delivered and that it is all that complainant claims it to be. If this copy of the alleged lost agreement was set out upon the pages of the Oregon Central minute book separate and distinct from any matters that were related to or connected with the execution of such an instrument, it would perhaps be incompetent for the Court to consider such records as evidence to any extent whatever. It would evidence no corporate action in such case. We are, however, presented with no such circumstance. On the other hand, the events recorded

upon the pages immediately preceding and immediately following the pages upon which this alleged copy of the alleged lost agreement is set out (pages 408 and 409 of transcript, Vol. I, pages 175 and 6 of Exhibit 7) and which have been discussed hereinbefore (see pages — to — *supra*), clearly and logically show that such an agreement was executed and delivered, and that in the absence of any other evidence in the record, the Court would be justified in so finding. The minutes are *prima facie* evidence of the facts set out therein.

There is a general rule of law to the effect, and which seems to be supported by a great many authorities, that the private records of a corporation can not be introduced to prove matters and things therein recorded which are adverse to the interests and claims of third persons who are *strangers to such* records. These authorities seem to hold that in such a situation stockholders, directors and officers of a corporation stand upon the same footing.

See page 930, Thompson on Corporations,
Vol. 2, last paragraph Sec. 1860—citations 131

^{EX} Counsel for the defense has cited a great many authorities to the same effect.

These authorities base their reason for so holding upon the proposition that to admit such records would throw down the bars against fraud and to admit the private records of corporations in evi-

dence to prove claims of its own against third parties, would permit the clerks, officers, etc., of such corporations to prepare records suitable for proving any claims that might appear to be plausible.

See Sec. 1858, Vol. 2, Thompson on Corporations.

This author in commenting upon the admission of such records states:

“This doctrine has been severely criticised as both unjust and dangerous, unjust in that it would prove or tend to prove a relation never assumed and a contract never entered into, and dangerous because a secretary or other officer of a corporation, by entering a man’s name as stockholder on the corporate books might without his knowledge or consent make him a stockholder, and where counter-vailing proof has become impossible by reason of death or other circumstances, such unauthorized act might charge him or his estate with a burden he never assumed.”

But there is no presumption of fraud, and where corporate records appear regular, and are produced from the proper custodian, and the party to be affected by their introduction was present and made the record, they are clearly competent, upon two grounds:

First, corporate records required to be kept; *Second*, because they constitute admissions made by the party participating or knowing their contents.

However, they do not hold that where a case is presented that is free from any suggestions of fraud or other suspicious circumstances tending to show that the matters and things therein recorded are fabrications, that such records are not admissible, especially where such records contain a history of certain events which lead up to the culmination of the business transaction or other matter in dispute, in such a logical manner as to admit of no doubt that it was so transacted and that the obligation in dispute was incurred, and that the memoranda made by these records were made in the usual and ordinary course of business, by the person whose duty it was to make the same.

It certainly cannot be seriously considered by the court that there is fraud in the preparation of corporate records where it appears that the person who claims adversely to such corporation in a cause where such records are offered in evidence, was present when such records were made and had knowledge of and participated in the matters set out in such records and leading up to the creation of the obligation such corporation seeks to enforce. Upon reason alone, without the aid of any precedent, the court could safely conclude such records were admissible as competent evidence to prove such claim or obligation against a third person under such circumstances. Besides, he would not be a "third person," or "stranger" within the meaning of the authorities.

“Corporate books are competent evidence against directors and officers who have had access to and have examined the books.”

Vol. 3, Cyc. of Evidence, page 656

Smith v. North Carolina RR. 68 N. C. 107

New England Mfg. Co. v. Van Dyke, 9
N. J. Eq. 498

Eigeman v. Rockford Bldg. Ass’n, 79 Ind.
41

Hamilton Buggy Co. v. Iowa Buggy Co., 88
Ia. 36

In the case of Hamilton Buggy Co. v. Iowa Buggy Co., 83 Ia. 36, it was stated:

“While the entries in the books of a corporation are not evidence as against *strangers*, yet where there was evidence that the defendant and the intervenor used the same books and that the intervenor owned the defendant, held, that there was no error in permitting the books to be introduced as against the intervenor though they were designated as the defendant’s books.”

The rule contended for by appellant seems to be more liberally enforced where it appears that such records are shown to be a part of *res gestae*.

It is clear from what has been hereinbefore stated, that the signing of the agreement of March 28, 1870 by Ben Holladay & Company was contemporaneous with the making of the records appearing upon pages 160 to 208 of Exhibit 7 (pages 393-440 transcript, Vol. I). A reading of these

pages will show that Ben Holladay had knowledge of all matters herein set forth.

Terry v. Birmingham Natl. Bank, 93 Ala. 609, in which the court said:

“The books of a stock exchange are not admissible as evidence against the pledgar, whose stock was sold on the ground that his power of attorney had made the corporation his agent to sell, unless it is shown that the entries were made contemporaneous with the sale or so near as to come within the principle of *res gestae*.”

Flemming et al vs. Yost et al, 137 Ind. 95, in which the court stated:

“In an action to set aside a conveyance as fraudulent, the grantee may introduce in evidence various amounts of money paid to the grantor at various times, the entries being made at the time of payment; such evidence being admissible as a part of the *res gestae*, to illustrate and bring out fully the whole transaction in regard to the transfer and the consideration therefor.”

Other authorities to the same effect:

Greenleaf on Evidence, Sec. 120, Vol. I.

Elliott on Evidence, Sec. 164, Vol. I—

Also, Secs. 537-541, 2 and 3 of same book.

Would anyone pretend that in the absence of fraud, Ben Holladay could dispute the facts recited in the corporate records which he, as a majority stockholder, had made and caused to exist?

There is no reason for enforcing the rule, that

corporate records are not admissible against strangers to such records, where it appears that the corporate records and books are offered in evidence to prove a claim against one of its members, especially where it is shown that he had knowledge and acquiesced in the making of such records.

It appears from the statement of Ben Holladay himself that he was a stockholder (see pages 2 and 3 of Exhibit 52, which is Ben Holladay's affidavit in the case of John Nightingale et al. vs. Oregon Central R. R. Co., et al. (pages 1477-1478 transcript, Vol. III). wherein he stated as follows:

"I admit and state the fact to be and so it is that on or about the 7th day of September, A. D. 1869, said Oregon Central Railroad Company, defendant herein, did, acting by and through its then board of directors, each and all of whom acted fairly and in good faith and according to their best judgment and without any confederation, collusion or fraud, and for a valuable and adequate consideration, cause to be issued and delivered to this affiant and in his name 39,930 shares of the capital stock of the defendant the Oregon Central Railroad Company".

There certainly could be no better evidence that he was a stockholder in the Oregon Central Railroad Company than the above quotation from the affidavit of Ben Holladay.

We also have further proof to the same effect, (see pages 15 and 16 of Exhibit 26 page 1318

transcript, Vol. III), which is a recital from the contract between the Oregon Central and the Oregon & California R. R. Co., to the effect that the firm of Ben Holladay & Company were the owners of 64,661 shares of the stock of the Oregon Central R. R. Co.

“The plaintiff after introducing in evidence the certificate of stock held by the defendant offered the company’s *stock* certificate books and ledgers to show that he was an original shareholders and that his stock was only partly paid. These books were properly admitted. It has been said by some courts that a corporation’s stock books are in all cases evidence in its favor to show that the names it has entered as shareholders are such in fact. Citing *Turnbull v. Payson*, 95 U. S. 418. This doctrine, however, has never obtained in this state and rests on no solid principle.”

“But where the relation of shareholder has been otherwise shown to exist the books of the corporation become admissible to aid in determining when it commenced and what if anything has been paid upon the shares. Shareholders in a moneyed corporation by a contract of membership constitute it their agent and keep such stock books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them though not conclusive.”

Carey v. Williams, 79 Fed. 906.

Thompson on Corporations, Section 1857, p. 928, states in connection with the above.

“In order to render such books and records

admissible it should be shown by some competent witness that such books are kept in the ordinary course of business and that the entries made therein were made in the due and ordinary course of business; and either that certificates of stock were issued and delivered to the person sought to be charged, *or that he took part in the meetings of stockholders during the period of time his name appeared upon the books, or both.*"

It has been urged, however, by counsel for the defendant that where an attempt is made to establish title to real property by records of a corporation wherein an alleged copy of an alleged lost instrument conveying or agreeing to convey real property is set out, that a greater degree of proof is required as to such instrument being legally executed, and that the exclusionary rules of evidence are enforced more rigorously where an attempt is made to establish title to real property in the manner stated above.

It might be urged for that reason that the authorities just cited are not in point. Upon reason, however, it is readily seen that so far as the ultimate result of admitting such evidence is concerned, the effect might be just as disastrous if such evidence was improperly admitted in cases to enforce payment of sums due on stock subscriptions or other indebtedness, for the reason that it is well known and understood that a judgment of record is an incumbrance against real property and

upon execution real property could be sold by such judgment creditor, and title of the judgment debtor to such real property could thereby be divested. The objection goes to the weight and not to the competency of the evidence.

Complainant has been unable to find in any of the cases cited by defendant any authority for holding that where it is shown by the evidence that entries and other records appearing upon books of a corporation have been made by and with the knowledge and consent of the stockholder or other person, that such records are inadmissible to prove certain facts therein recorded against such person having such knowledge.

This principle is governed by the law of evidence relating to admissions. Its admissibility does not depend in that instance upon the ground that it is a corporate record but that it is a writing made by the party or admitted by him to be correct.

Before passing we will at this time show that according to the rules of evidence relative to admissions that the affidavit (Exhibit 52) is properly before the Court for the purpose of showing that Ben Holladay had notice of the matters and things recorded from pages 160 to 208 of Exhibit 7. (see pages 393 to 408 of transcript Vol. I)

From the decision just above quoted, it will appear that even where entries were made by clerks of the corporation, that such entries may be deemed

to have been made for and on behalf of the stockholders.

Further, if upon considering the other circumstances tending to show that Ben Holladay was present when these records were prepared, it would aid the Court in deciding whether or not he was so present, (to determine whether or not he was a stockholder,) then such affidavit would clearly be admissible even though the question as to whether or not he was a stockholder was not one of the issues raised by the pleadings. This is a question for the Court to decide.

“By the term ‘relating’ we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which, according to the common course of events, either taken by itself or in connection with other facts, proves or renders probable a past, present or future existence of the other.”

Seller vs. Jenkins, 97 Ind. 430-38.

Aside from the objection that it is not addressed to any issues in the pleadings, it being an admission of Ben Holladay and defendant being herein a privy in interest, such affidavit is admissible to prove that he was a stockholder and as such in all probability knew of the recording of the alleged lost agreement (pages 175 and 176 of Exhibit 7, pages 408, 409 transcript, Vol. I).

“The admissions of a party to a fact wher-

ever or however made, are evidence against him when pertinent to the question involved in the case on trial."

Robbins v. Butler, 24 Ill. 388

Hayman v. Wheeler, 29 Fed. 347.

DID BEN HOLLADAY HAVE KNOWLEDGE OF MEETING OF MARCH 28th, 1870?

The next inquiry, and one which is pertinent at this point, is there any evidence in the record to prove that Ben Holladay was present at the meetings which, from the records appearing upon pages 160 to 187 of Exhibit 7, appears to have been held on or about the 28th day of March, 1870, and did he have knowledge of the events recorded upon the pages coming before page 175, (page 408 of transcript, Vol. I) and of the events appearing of record on pages subsequent to page 177, of said Exhibit 7 (page 409 transcript, Vol. I). Complainant contends that there is evidence in the record which clearly establishes the above proposition beyond any question.

For a starting point to show that Ben Holladay had knowledge of all these transactions and participated in them, we will first direct the Court's attention to one parcel of evidence which defendant cannot object to as being a fiction.

In Exhibit 26 (see pages 1298 to 1332 transcript, Vol. III) we have a certified copy of the deed from the Oregon Central to the Oregon & California R. R. Co., which embodies a part of

the records of the Oregon Central minute book (Exhibit 7). Before entering upon the discussion of the relevancy of this document to the point to be made, we will first consider defendant's objection to its admission.

In brief, defendant contends that it is not the best evidence to prove the existence of the alleged lost instrument; that no foundation has been laid for introducing it as secondary evidence, and that it is incompetent as not describing the property in dispute as being a part of the property to be conveyed by the Oregon Central to the Oregon & California R. R. Co.

The last objection is the only one which need be considered at this time, as the other objections will be satisfied when it is shown hereinafter that the agreement of March 28, 1870 (the alleged lost agreement) was lost and that a proper search has been made to locate same, and that it has not been found.

Defendant's objection that the said Exhibit 26 is incompetent if offered to show that the Grindley and Elliott tracts were conveyed to the Oregon & California R. R. Co., by the Oregon Central, because it does not sufficiently describe these tracts cannot be sustained.

A writing agreeing to convey all of the real property of a grantor within the State of Oregon, especially in Multnomah and Clackamas Counties is not void as being too indefinite and

uncertain in a description of the property to be conveyed to be enforced, but will pass title to all of the real property to the grantee within the said counties and state.

Tiffany on the Law of Real Property, Vol. 2, Sec. 387, p. 882
Wilson v. Boyce, 92 U. S. 325.

This agreement between the Oregon Central and the Oregon & California R. R. Co., contains practically all of the proceedings recorded upon pages 180 to 208 of Exhibit 7 (pages 393 to 440 inclusive of transcript Vol. I) and resolutions and matters relative to the execution of the alleged lost agreement acted upon by the directors and stockholders are embodied in and made a part of this agreement.

It is set out in this agreement that the Oregon & California R. R. Co., was organized (page 3, Exhibit 26, see page 1303 of transcript Vol. III) and that a proposition was made by such corporation to the Oregon Central through its president, Ben Holladay (which proposition was in the form of a resolution passed by the board of directors of the Oregon & California R. R. Co.), empowering him to enter into negotiations with the Oregon Central for the purchase of its railroad and other property. This proposition was submitted by Ben Holladay over his own signature (see pages 4 and 5 of Exhibit 26—pages 1303-1304 and 1305 of transcript Vol. III). This proposition was accepted by the directors of the Oregon Central *subject to the ap-*

proval of the stockholders (see top of page 6 of Exhibit 26—pages 1305 and 1306 of transcript Vol. III).

In the resolution passed by the board of directors accepting the above offer, it was recited, among other things, that the Oregon Central was *indebted to divers persons, principally to Ben Holladay & Company in the sum of approximately \$800,000.00, which the Oregon and California Railroad Company agree to pay unto Ben Holladay & Company* in consideration of the transfer by the Oregon Central of all of its property to the Oregon and California Railroad Company (see page 7 of Exhibit 26—page 1307 of transcript Vol. III).

The action of the directors of the Oregon Central in accepting the offer made by the Oregon & California R. R. Co., was ratified at the special meeting of the stockholders called for such purpose (see pages 17 and 18 of Exhibit 26, pages 1320 and 1321 of transcript Vol. III).

The Court's attention is particularly called to the reference made to directors meeting held on March 14, 1870, at which a resolution was passed to call such meeting (pages 14, 15 and 20 of Exhibit 26, pages 1316, 1317 and 1318 of transcript Vol. III), where it is stated that a special meeting of the stockholders of the Oregon Central was to be held on the 28th day of March, 1870 for the purpose of determining the propriety of dissolving the Oregon Central Railroad Company and settling up its busi-

ness, disposing of its property and the division of its capital stock (see page 15 of Exhibit 26, page 1318 of transcript Vol. III).

On pages 15 and 16 of Exhibit 26, (page 1318 of transcript Vol. III) immediately following, it is recited that such meeting was held and that all of the stockholders were present, *including Ben Holladay & Company*, who were the owners of 64,661 shares of the stock of the Oregon Central, and that at this meeting the Oregon Central was to be dissolved upon the settlement of its affairs and the sale and conveyance of its property and franchises.

At the bottom of page 20 of Exhibit 26 (see bottom of page 1321 of transcript Vol. III) it is stated again that the Oregon and California R. R. Co. is to pay all debts of every kind or nature of the Oregon Central.

It appears from this Exhibit 26 (see pages 1317 and 1318 of transcript Vol. III) that on the 14th day of March, 1870 the sale of the Oregon Central to the Oregon & California R. R. Co. seems to have been anticipated by the Oregon Central notwithstanding, as we have shown, that the proposition to purchase was not made until the 28th day of March following (see page 4 of Exhibit 26, see pages 1310-11-12 of transcript Vol. III). This fact is significant when considered with the other matters above referred to.

At the meeting of the stockholders on the 28th day of March, 1870, it appears that the firm of

Ben Holladay & Company were the holders of practically all of the stock of the Oregon Central (and as has hereinbefore been shown, Ben Holladay was the principal owner in the firm of Ben Holladay & Company—see page 1 Exhibit 24, page 1184 of transcript Vol. III). From this fact there can be no error in concluding that Ben Holladay caused the meeting of the board of directors of March 14, 1870 to be held and that he controlled the proceedings thereof, and that it was at his instance that the resolution was passed authorizing him to purchase for and on behalf of the Oregon and California R. R. Co. all of the property of the Oregon Central.

This becomes more evident when considered in connection with the fact that it is also made a part of the minutes of the meeting of March 28, 1870 that the proposition to purchase the Oregon Central by the Oregon & California R. R. Co. was submitted by *Ben Holladay personally*, and further, that the Oregon & California R. R. Co. was to pay the firm of Ben Holladay & Company the sum of \$800,000.00 in part consideration for the covenants and agreements to be performed by the Oregon Central (said sum being the amount which had been determined to be due the firm of Ben Holladay & Company for building the said railroad). In this connection the court's attention is called to the following excerpt from Ben Holladay's affidavit which appears on pages 1475 to 1508 of the transcript, Vol. III:

“I deny that the property, rights and franchises and subsidies which were transferred, or which purports to be transferred by said Indenture mentioned in subdivision 17 of complaint herein were on the 28th day of March 1870, or at any other time of the value of seven millions of dollars or of any greater value than from \$800,000 to \$1,000,000. I deny that they are now of that value, and I aver that the addition to their value has been solely by reason of money since then expended upon it by the Oregon and Cal. Railroad Co. I deny that the said Oregon and California Railroad Company has not paid any money or other valuable thing for said sale and transfer, but I aver and state the fact to be, that said Oregon and California Railroad Company has paid all debts and liabilities of said Oregon Central Railroad Company, and caused all its obligations to be surrendered and cancelled, towit, an indebtedness of over \$800,000.”

Here we have an admission from Ben Holladay that the said sum of \$800,000 was paid by the Oregon & California Railroad Co. the successor of the Oregon Central Railroad Company, and that Ben Holladay was the principal beneficiary of this sum is established beyond question by connecting the above admission with the recitals in the alleged lost agreement (see pages 408 and 409 of transcript, Vol. I), to the effect that the Oregon Central Railroad Company was to pay Ben Holladay & Company for all moneys laid out, expended, and

incurred in building the first 20 miles of its railroad, an amount not less than \$800,000. These are very significant circumstances, and it would be very difficult to imagine by what process of reasoning it could be concluded that Ben Holladay was not at the very bottom of all these preliminary movements that resulted in absorption of the Oregon Central by the Oregon & California Railroad Co.

The very fact that it appears, as has been said above, that it was agreed as a part of the consideration for this transfer that the firm of Ben Holladay & Company were to be paid the sum of \$800,000.00 by the Oregon & California R. R. Co. the corporation of his own creation, is sufficient to justify a conclusion that he had sufficient interest in these matters to have been on hand when they were being consummated, especially in view of the fact that it has been shown that he would be the principal beneficiary of the said sum as being the principal owner of the firm of Ben Holladay & Company. This is so self-evident that no further detailed discussion is necessary or will be indulged to convince the court that Ben Holladay was the moving and directing spirit in all these transactions as evidenced by pages 160 to 208 of Exhibit 7, pages 393 to 440 of transcript, Vol. I.

We are, however, not dependent entirely upon these circumstances alone to establish the above fact, but have the statement of Ben Holladay

under oath that he was present and had knowledge of all that transpired relative to the execution of these agreements of March 28, 1870 (the alleged lost agreement) and March 29, 1870, as is recorded on pages 175 to 208 of Exhibit 7, page 408 of transcript, Vol. I). In his affidavit in the suit entitled John Nightingale et al vs. Oregon Central R. R. Co. et al (Exhibit 52), he states as follows:—Quoting—(from page 1479 of transcript, Vol. 3)

“I admit that in March, 1870, the capital stock of the Oregon Central was cancelled by the stockholders and directors of that Company, towit, on the *28th and 29th days of March, 1870*, at the date of dissolution of such Company, as will more fully appear from other portions of this affidavit.”

Quoting further: (page 1479 of transcript—Vol. III)

“I deny that the proceedings of said stockholders meeting held on the *28th day of March, 1870*, or at any other time, or of said directors in causing the execution of said indenture referred to in subdivision 17 of complaint, were dictated or controlled by me or that each and every or any of the stockholders present at said stockholders meeting voted in favor of said sale or transfer at the request of or at the dictation of myself, or as my tools or confederates. I admit that it was the common judgment of all *said stockholders and directors and myself that such proceedings then had was for the best interests of all con-*

cerned in said Oregon Central Railroad Company."

Quoting further from page 7 of said affidavit:—
(page 1483 of transcript Vol. 3)

"That said 3700 shares of stock now claimed by said Nightingale has never been transferred on the books of said Oregon Central, but were on the 28th day of March, 1870 yet standing on said books in the name of A. J. Cook, at which time said Oregon Central was legally dissolved by a vote of two-thirds of its stock at a meeting duly and legally called for such purpose at the office of the company in Salem, Oregon."

Quoting further: (page 1484 of transcript Vol 3)

"That a copy of the resolution passed by the directors of the Oregon Central Railroad Company calling such meeting of the stockholders of said company to meet on the 28th day of March, 1870, for the purpose of determining the propriety of and authorizing the dissolution of such corporation, the settling of its business, *disposing of its property and division of its capital stock*, and also a copy of the notice of such meeting, which notice was published by the said corporation, is attached to the complaint herein (referring to the case of Nightingale et al vs. Oregon Central et al). That at such meeting of the stockholders and in pursuance of such notice the sale of all its property was made for the purpose and in the manner and for the reasons as will more fully appear *by the recitals in*

said deeds, of conveyance, a copy of which is given on pages 298-311 inclusive, in said exhibit attached to complaint herein (referring to the case of Nightingale et al vs. Oregon Central et al), and said Oregon Central Railroad Company was then duly and legally dissolved, and all its stock legally cancelled in strict compliance with the statutes of Oregon in such cases made and provided, etc., all of which proceedings were ratified and confirmed by the directors of said Oregon Central at a meeting duly called and legally held at the office of the company on the same date."

This affidavit contains many more statements showing beyond any question that Ben Holladay was fully informed and advised as to all that is narrated upon pages 160 to 208 of Exhibit 7, (pages 393 to 440 of transcript, Vol. I) but what has above been quoted will be sufficient in connection with the circumstances just above related to remove all doubt as to whether or not he had knowledge of such facts. We have already shown above that this affidavit is properly before the court. (See pages 1507 and 1508 of transcript, Vol. III) It has been urged by counsel for defendant that Ben Holladay's affidavit has not been properly identified. The court's attention is called to the testimony of R. Koehler, on page 901 of the transcript, Vol. II, as follows:

Q. Mr. Koehler, I will ask you to look at this original affidavit, and state whether or not that

is the original signature of Ben Holladay, which is marked filed in this case June 22nd, 1871?

A. *Yes it is.*

It would hardly seem necessary to cite any further authorities in support of the proposition that the records of the Oregon Central are admissible as secondary evidence to prove the existence, execution and delivery of the alleged lost agreement of March 28, 1870, in so far as defendant's objection that they are incompetent as being self-serving, are concerned, but we will refer the Court to a few authorities which bear directly upon the point.

In Section 727, Cook on Corporations, 5th Ed. Vol. 3, it is stated:

“The minutes of a meeting of a corporation are admissible to show what took place as *against members who attended the meeting.* Booth v. Dexter, 118 Ala. page 369, in which the Court stated: ‘In an action brought by a corporation on a promissory note given by one of its stockholders who had served as treasurer, in the settlement of a claim against him for the loss of corporate funds, the minutes of the meeting of the plaintiff corporation, at which the defendant was present and when action was taken regarding the giving of the note sued on, are admissible in evidence for the purpose of showing what was done at said meeting in reference to the giving of the note by the defendant and its acceptance by the plaintiff in settlement of its claim against him’.

“A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto. Where a party owns all of the stock of a corporation it has been held that he is chargeable with entries upon its books, and the Court again cites *Hamilton Buggy Co. vs. Iowa Buggy Co.*, 88 Iowa 364” (which has been referred to hereinbefore).

“In like manner they may constitute admissions on the part of the members of the corporation, when the circumstances are such that the members can be deemed conversant with their contents. Thus, *the books of a bank showing its account with the president, who had access to such books, may be admitted in an action against him by a receiver of the bank to show the state of accounts with the bank, or to show, in such action, the proceedings of a directors’ meeting. Although in general the books of a corporation are not competent evidence to affect strangers, they are admissible as between the members on proof of knowledge on their part of such entries.*”

Jones on Evidence, pocket edition, p. 655-656

Olney v. Chadsey, 7 R. I. 224

Chase v. Sycamore Ry. Co. 38 Ill. 215

Union Bank v. Call, 5 Fla. 409

Cook, Corp. (5th Ed.) Sec. 727

It has been hereinbefore shown that Ben Holladay is not a stranger to the matters and things recorded in the Oregon Central Railroad Company’s minute book, Exhibit 7.

“Now, if the fact of subscription was susceptible of proof at all by secondary evidence, here were circumstances that speak trumpet-tongued in favor of it; circumstances more definite and conclusive in their nature than those which have condemned many a man to the gallows. *The corporation books, though not generally evidence against a stranger, are so against a corporator present and assenting to the entries made in them:* 4 W. & S. 373. They were properly admitted against the defendant, for the letters patent were prima facie evidence that he was a corporator; and, taken in connection with his acts and declarations, they persuade irresistibly to the conclusion that he was a subscriber.”

Graff v. The Pittsburg etc. R. R. Co., 31 Pa. St. 495

It is undoubtedly true that entries made in the due course of business, by officers authorized to make them, are admissible in evidence against the stockholders. This is said to be on the theory that the officer, in making such written entries, acts as the agent and representative, not only of the corporate entity, but as the stockholders regarded as unincorporated partners. *And such records were held competent against a corporator who was shown to have been present at the time of the transactions therein recorded, and to have assented to the entries made.*

Zang v. Wygant, 25 Colo. 551, 56 Pac. 565,
71 Am. St. 145

Schalucky v. Field, 124 Ill. 617, 16 N. E.
904, 7 Am. St. 399
Graff v. Pittsburg etc. R. Co., 31 Pa. St.
489

A reading of the affidavit of Ben Holladay (pages 1475 to 1508 of transcript, Vol. III) will show that he admitted repeatedly that he was in attendance at the meetings of the Oregon Central Railroad Company, and that he was fully informed of all that transpired at such meetings.

The better rule undoubtedly is that corporate books alone are not even *prima facie* evidence of a contract of membership, and are not admissible against a person denying his liability as stockholder; they cannot be received as the sole dispositive evidence of any such disputed fact. *In order to render such books and records admissible it should be shown by some competent witness that such books are kept in the ordinary course of business, and that the entries made therein were made in the due and ordinary course of the business; and either that certificates of stock were issued and delivered to the person sought to be charged, or that he took part in the meetings of stockholders during the period of time his name appeared upon the books or both. The book or record should be supplemented by identifying testimony.*

Zang v. Wygant, 25 Colo. 551, 56 Pac. 565,
71 Am. St. 145
Adams v. Clark, 36 Colo. 65, 85 Pac. 642
Schalucky v. Field, 124 Ill. 617, 16 N. E.
904, 7 Am. St. 399

Foote v. Anderson, 123 Fed. 659

Union Sav. Bank v. Williard, (Cal.) 88 Pac.
1098

Holland v. Duluth Iron Min. etc. Co. 65
Minn. 324, 68 N. W. 50, 60 Am. St. 480

The general rule as to the admissibility of corporate records is clearly and fairly stated in the preceding paragraph, and directly bears upon the present dispute. It has been clearly pointed out hereinbefore that these records of the Oregon Central Railroad Company as evidenced by Exhibit 7, (pages 380 to 440 of transcript, Vol. I) were made in the due and ordinary course of business, by one whose duty it was to keep such records. It has also been shown that these records were produced by the proper custodian, and that the signature of the person who made the entries therein have been recognized by persons now living.

CORPORATE RECORDS.

“For the purpose of showing that under the successive statutes re-enacting St. 1811, c 6, Sec. 3, now R. L. c. 37 Sec. 12, an unincorporated religious society had acquired by a continuous adverse possession of twenty years, a title to certain land by limitation, entries from the record book of the society are admissible to show its original organization and a vote to purchase the land in question and to erect a house of worship thereon, and if the entries in the record book are certified to by a

deacon of the church as clerk of the meeting, to whom in his own name a deed of the land in question was made, immediately after the vote of the society to purchase it, the record is relevant to establish the fact that in taking the deed of this land in his own name he was acting in behalf of the society and was not purchasing it for himself."

First Baptist Church of Sharon v. Harper,
191 Mass. 196

The case just cited bears a close analogy to the case at bar, inasmuch as the corporate records were used to establish title to realty claimed by an individual who participated in meetings of the society whereat such records were made.

On pages 1483 and 1484 of transcript, Vol. III, (excerpts from Ben Holladay's affidavit) the agreement of March 28th, 1870, is in part identified, as has been hereinbefore more particularly stated. (See page 53 supra) It has been held that where the contents of an instrument have been admitted, that the opposite party is relieved of the burden of proving it.

"A party, also, who admits a document to have certain contents, may relieve the opposite party from producing such document."

Wharton on Evidence, Sec. 165, 8th Ed.

The trial judge, R. S. Bean, in announcing his opinion, seemed to be guided largely by the doc-

trine as to the admissibility of corporate records, by the law as stated by the following authorities:

Thompson on Corporations, Sec. 7740, Vol. 6.

Carey v. Williams, 79 Fed. 906

Hayden v. Williams, 96 Fed. 279

Edwards v. Bates, 117 Fed. 526-537

These authorities were cited by counsel for defendant in their trial brief, and were chiefly relied upon to bar the admission of the minute book of the Oregon Central Railroad Company, as secondary evidence of the existence, execution and delivery of the agreement of March 28th, 1870.

After a careful examination of all of these authorities we fail to find that they support defendant's position. Section 7740 of Thompson on Corporations makes no reference to the subject in dispute. This author, however, does support appellant's position, that where from the evidence it appears that a stockholder was present and participated in the proceedings of a meeting of the directors or stockholders, he is bound by such minutes.

Thompson on Corporations, Sec. 1857, p. 928, Vol. 2, 2nd Ed.

The following quotation from the opinion of the court in the case of Carey v. Williams, *supra*, will show that the rule applied therein cannot be applied to the state of facts in the case at bar.

"Inasmuch as there was no evidence of the alleged admission of the defendant, the only evi-

dence in the case tending to prove that he was a stockholder was that consisting of the entries in the books of the corporation. We are thus brought to the important question in the case, which is whether the entries contained in the corporate books of the company afforded prima facie evidence that the defendant was a stockholder. The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties. The assent is evidenced when the name of the stockholder appears as such upon the books of the company; as to the corporation, by its act in placing his name there; and, as to the stockholder, by his knowledge and acquiescence in the act. It is not enough that he appears to be a stockholder upon the books, and when this occurs without his sanction he incurs no liability as such."

The court's attention has been directed to evidence, (see affidavit of Ben Holladay, pages 1475 to 1508 of transcript, Vol. III) which clearly connects Ben Holladay with these proceedings of the Oregon Central Railroad Company, as evidenced by their minutes of March 28th, 1870.

The law on this question as announced by *Hayden v. Williams*, and *Edwards v. Bates*, *supra*, is substantially the same as is announced in *Carey v. Williams*, *supra*, and is applied under substantially the same circumstances.

In the case of *Fish, Receiver, v. Andrew H. Smith*, 73 Conn. 377, 391, the court in commenting

on the case of *Carey v. Williams*, *supra*, had this to say:

“Where the relation of stockholder has been otherwise shown to exist, the books of the corporation become admissible to aid in determining when it commenced and what, if anything, has been paid in upon the shares. *Shareholders in a moneyed corporation, by their contract of membership, constitute it their agent to keep such stock books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them, though not conclusive.*”

In the present case it has been clearly established that Ben Holladay was the principal stockholder in the Oregon Central Railroad Company and that he participated in the proceedings of March 28th, 1870, and that he executed the agreement of March 28th, 1870, as is evidenced by the corporate record of said date.

If it should be the opinion of the Court that the facts above related as to Ben Holladay having knowledge of the entries referred to in Exhibit 7, were insufficient to charge the defendant with notice of the matters and things recorded in said Exhibit 7 as being a privy in interest, then the complainant contends that for other reasons this minute book should be admitted.

From the testimony of R. Koehler, it appears that the persons who kept and prepared the records appearing upon pages 393 to 440 transcript, Vol.

I, (see R. Koehler's testimony, pages 689-693 of transcript, Vol. II) are not now living; that he knew Mr. S. A. Clark, who was secretary of the Oregon Central and that he recognized the signature in the book just referred to containing Exhibit 7 appearing upon pages 1 to 134, (pages 393 to 440 of transcript) as that of S. A. Clark. And further, that he also recognized the signature of George E. Cole, secretary of the Oregon Central, who succeeded S. A. Clark; also of the president, I. R. Moores appearing on pages 136 to 208, and that all of these gentlemen have long since died.

CORPORATE RECORDS ARE ADMISSIBLE AS EVIDENCE AGAINST THIRD PARTIES EVEN THOUGH THEY ARE SELF-SERVING.

“Even though entries appearing in books of a corporation are only admissible to prove its charter and organization, election of officers, etc., and other corporate acts and not for the purpose of proving its claims against third persons, or its stockholders whose interests are adverse to such corporation, where, however, it appears that such entries were made by persons since deceased and that they were made in the regular and due course of business by one whose duty it was to make them, and who at the time had no interest to misrepresent the facts, then such records are admissible.”

Wheeler et al vs. Walker, 45 N. H. 358-9

“What a person, having in charge a particular trust or duty, does in pursuance of that trust or duty is an act which may be proved by other testimony than that of the party who does the act, when he is dead and the testimony entirely lost.”

Welch v. Barrett, 15 Mass. 384

In Bland v. Warren, 65 N. C. 273, it is said:

“Self-serving entries made by a merchant were not admissible but where made by a clerk since deceased, are competent evidence of the matters they contain.”

Also, see Chaffee & Co. vs. U. S., 85 U. S. 541, in which the Court said:

“And the rule, with some exceptions, not including the present case, requires for the admissibility of the entries not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or be proved by their handwriting if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subject to cross examination, affords the greatest security for truth. *Their declarations, verbal or written must, however, some times be admitted when they themselves cannot be called in order to prevent a failure of justice. The admissibility of the declarations in such cases is limited by the necessity upon which it is founded.*”

HAS MINUTE BOOK OF OREGON CENTRAL RAILROAD CO. BEEN PROPERLY IDENTIFIED?

Counsel for the defendant contends that the Oregon Central Minute Book is not sufficiently identified or authenticated to be admitted, and before proceeding further we will show that this objection cannot be sustained. As to what must be shown the Court is referred to the following:

Thompson on Corporations, Sec. 1852,
Vol. 2.

This author lays down the general rules as to the authentication and identification of corporate records as follows:

“Before the records of a corporation are admissible in evidence for any purpose, on any theory, it must be made to appear *prima facie at least* that they are books of the corporation, and that they have been kept as such and that the entries therein were made by the proper acting officer. Such books do not generally prove themselves and do not carry within themselves intrinsic evidence of their authenticity to justify an introduction of the record. It has been held that it must be shown that the entries were made by the proper officer, *and generally such officer must be produced, or if dead, his hand writing be proved. Such proof may be made by the secretary or by the person having the custody of the book, or by the bookkeeper, and in the case of his death, by the proof of his hand-*

writing. The corporate book was held to be sufficiently identified where the clerk testified that it came to him with other books of the corporation”.

Elliott on Evidence, Sec. 1341, Vol. 2.

This author states:

“The authenticity of a record need not in all cases and in all jurisdictions be established by the legal custodian, but it may be sufficient for a *prima facie* case if it appears to come from the custody of the proper officer and is identified as a record of a particular office”.

While the above refers more particularly to judicial records or public records, the same principle can be applied to the authentication of private corporate records.

Complainant has shown by the testimony of R. Koehler (pages 688 to 695 and 8 of transcript, Vol. II), and of Chas. B. Moores (pages 220 to 225 of transcript Vol. I) that there is before the Court the direct evidence of the hand writing and signatures of officers who prepared and signed the minutes of the Oregon Central Railroad Company appearing on pages 134 to 208, pages 393 to 440 of transcript Vol. I and that these officers are not now living.

On page 918 of transcript Vol. II of record, Mr. C. A. Dolph states in answer to the following question:

“I call your attention to the purported copy

of this instrument at page 175 and 6 (referring to Exhibit 7, upon which are set out the alleged lost agreement of March 28, 1870), and will ask you whether or not all of that is in the handwriting of A. J. Moses, and if not, in whose handwriting it is?"

to which Mr. Dolph replied:

"All of the record that is not in the handwriting of Mr. Moses, as I take it, is in the handwriting of Mr. Cole."

On page 892 of transcript Vol. II, testimony of J. C. Moreland, this witness was asked to identify the handwriting appearing upon pages 175 and 176 of Exhibit 7 just above referred to, and replied, after making an examination, that it was that of A. J. Moses, and that A. J. Moses had been dead a good many years; that he was at the time this record was made, a resident of the City of Portland, and was in the employ of Mitchell, Dolph & Simon, who were attorneys for the Oregon Central Railroad Company.

At the top of pages 687 to 688 of transcript Vol. II, testimony of R. Koehler, this witness states that he is an officer of the Oregon & California Railroad Company and that as such officer he acted and relied upon such records as being authentic, and on page 690 further states that the record of the agreement appearing upon pages 175 and 176 of said minute book (Exhibit 7) pages 408 and 409 of transcript Vol. I had been in this book ever since he, (R. Koehler), first saw said book.

From the testimony of L. F. Steel, it is shown that he was the custodian of the records of the Oregon & California R. R. Co., under the supervision of Mr. W. W. Cotton, as secretary, who succeeded Mr. George H. Andrews, as secretary his predecessor, and that he had the custody of the Oregon Central minute book (Exhibit 7) just referred to in connection with other records of the Oregon Central Railroad Company; that he was directed by Mr. Cotton to produce Exhibit 7, minute book of the Oregon Central Railroad Company, for and on behalf of the complainant at the taking of testimony before Mr. Geo. A. Brodie, U. S. Examiner, on the 16th day of September, 1911; that Exhibit 7 was one of the records received by Mr. Cotton as secretary from Mr. Andrews, as secretary his predecessor. (See pages 466 to 467 and 468 of transcript Vol. I).

Applying the rules of evidence relative to the authentication and identification of records above cited, to the foregoing facts, it is clear without entering into any further discussion of the subject, that Complainant's Exhibit 7 cannot be excluded from the record as not being sufficiently authenticated.

Even though it should not be sufficiently shown to the Court that Exhibit 7 (See pages 393 to 440 of transcript) has been properly identified, it should be admitted upon the ground that it is in itself an ancient record and when shown to have been produced from its proper custody, proves itself.

In the case of *Goodwin v. Jack*, 62 Me. 416, it is said:

“The books offered in evidence purporting to be Pejepscot records, cover a period of more than one hundred years, and contain strong internal evidence of their own verity. There is no evidence to impeach their genuineness or their present existence by the proprietary or of any person authorized to represent it or having any proprietary interest therein. At the time of the trial they were in the possession of the librarian of the Maine Historical Society. Time has swept away all who could have testified as to the original organization of the association. To require such evidence or parole testimony in the ordinary way that the books are what they purport to be, would be practically to exclude these records from being used as evidence in any case affecting the title to any land originally derived from those proprietors. Under these circumstances we think that the books offered are to be regarded as proving themselves to be what they purport to be without parole or other evidence of their original organization or the regularity of their subsequent meetings. They are in fact the best evidence of those facts that is obtainable. The entries therein were made by authority of the party interested to preserve and perpetuate the evidence of certain transactions contained in letters and other fugitive papers liable to be lost or destroyed. Being found, as we have seen, among records that prove themselves after the lapse of more than one hundred years, these entries may

properly be regarded as primary evidence, the presumption being that the originals have long since been lost or destroyed and no shadow or suspicion resting upon their authenticity.”

While the above authority cannot be said to be directly in point it portrays a principle which is based upon logic and common sense. As argued in the case cited, if the contents of the records set forth in complainant’s Exhibit 7 furnish strong intrinsic evidence of their own verity, upon what hypothesis should such records be excluded? The rules of evidence relating to excluding certain classes of evidence or testimony is based upon logical reasoning. Furthermore, the Court’s attention is directed to the fact that there is not one single item of evidence in the record introduced by the defendant to show that there was any fraud or mistake in preparing, or in the production of the said minute book of the Oregon Central Railroad Company, or which would tend to show in the slightest degree that said record was not all that it purports to be.

The principle of reasoning upon which the above decision rests, existed prior to the formation of any technical rules of law, and we submit that the Court in considering whether or not Exhibit 7 should be admitted, will not find it necessary to search for any specific precedent to aid it in deciding that complainant’s exhibit 7 is all that it purports to be, and being so, must necessarily be admitted.

IS EXHIBIT 14, WHICH IS THE MINUTE BOOK OF THE OREGON & CALIFORNIA RAILROAD COMPANY, PROPERLY BEFORE THE COURT.

The objections of counsel for defendant to the introduction of Exhibit 14 are substantially the same as he has made to Exhibit 7, with a few exceptions.

FIRST: It is contended that Exhibit 14 is incompetent,, irrelevant and immaterial.

From what has been stated hereinbefore (see pages 80 to 83 *supra*) it will no doubt be sufficiently clear without making a further examination of the facts, that the execution of the Frankfort Committee agreement is one of the circumstances which, to say the least, throws some light upon one of the main issues in dispute, towit, as to whether or not it was the intention of Ben Holladay in signing the agreement of March 28, 1870 (the alleged lost agreement) to include within its terms all of the lands purchased by Ben Holladay & Co. in connection with the construction of the Oregon Central Railroad Company's railroad from Portland twenty miles south. As has hereinbefore been shown (pages 62 to 84 *supra*) the lands in dispute were purchased by Ben Holladay & Company for the use of Ben Holladay & Company in and about the construction of the Oregon Central Railroad. It is only natural that in view of the general terms used in the agreement

of March 28, 1870, by Ben Holladay & Company, when agreeing to convey all of its property to the Oregon Central, and from whom the same property was acquired by the Oregon & California R. R. Co. that strangers assuming control as was being done at the time this Frankfort Committee agreement was executed by the European bondholders, would naturally ask for just such an agreement. This being so, the Court has a right to consider it in connection with other circumstances hereinbefore related as tending to establish that it was the intention of Ben Holladay & Company when signing the agreement of March 28, 1870 to convey the lands in dispute to the Oregon Central Railroad Company. That it is a material fact is too plain to take up the time of the Court by citing any great number of authorities. The following will suffice to settle the question.

In *Brown v. Clark*, 14 Pa. St. 469, it is stated:

“Evidence relevant to the issue, although insufficient in itself to prove the same, should be admitted, especially if it is illustrative of other important facts involved in the action”.

In *Tolmi v. Dean*, 1 Wash. Ty. 46, it is stated:

“Although evidence offered fails to attain the full measure of what is required to sustain the party’s allegations, yet if it is a connecting link in the chain of facts necessary for him to prove, it should be admitted and left to the jury to pass upon its sufficiency.”

SECOND: That it is not the best evidence of any deed or other writing in issue, and that no foundation has been laid.

This objection will be covered by what will be stated hereinafter relative to the loss and search for the alleged lost agreement of March 28, 1870, this being the principal agreement which complainant wishes to establish as having been executed and delivered.

THIRD: That it has not been properly authenticated or identified.

We have already shown hereinbefore the manner in which this book was produced and have shown that it is the minute book of the Oregon & California Railroad Company, as it purports to be. (see page —, *supra*). In addition to what was there stated, see pages 930 and 931 of transcript Vol. II, where Mr. R. Koehler, witness for the complainant states that he recognizes the signature of *Ben Holladay* and other officers of the Oregon & California R. R. Co., appearing upon the pages of this minute book, and see page 489 of transcript Vol. I where Mr. L. F. Steel testified that Exhibit 14, which is Minute Book I of the Oregon & California R. R. Co., was in the custody of Mr. Cotton, secretary of the Oregon & California R. R. Co., and that it was received by Mr. Cotton from Mr. Geo. H. Andrews his predecessor. It also appears upon said page 489 that it was admitted by the attorneys for complainant and

defendant herein that this and all books which Mr. Steel had produced before Mr. Brodie, are part of the Secretary's books of the Oregon & California R. R. Co. On pages 466 to 468 of transcript Vol. I and preceding, it appears from Mr. Steel's testimony that he was the proper custodian and that he produced the said minute book No. 1 for and on behalf of complainant.

That Exhibit 14 is properly identified, the Court is referred to the authorities hereinbefore cited.

FOURTH: That the copy of the Frankfort Committee agreement appearing upon pages 191-2-3-and 4 and subsequent pages of Exhibit 14, (pages 1026 to 1042 inclusive of transcript Vol. II) is not an authenticated copy of the original even though its loss be established, and that no such agreement ever existed.

Upon pages 922-925 of transcript, Vol. II, from the testimony of Mr. C. A. Dolph, who was shown pages 190 to 204 of the said Exhibit 14, (pages 1026 to 1041 transcript, Vol. II) it appears that he and his brother prepared this and other agreements about the same date, in connection with Ben Holladay selling out his interest in the Oregon & California R. R. Co., and his retirement from the Company.

On page 924 of transcript, Vol. II, this witness states as follows, after being requested to look at the agreement appearing upon the pages just referred to:

“This was, as I recall it, about the time that Mr. Holladay retired from his connection with any of these corporations and about the time he went East, as I recall it.”

This shows that he was familiar with the circumstances connected with the execution of this agreement. In connection with this testimony, see page 614 transcript, Vol. II, (page 184 of Exhibit 14), where appears set out a telegram from Mr. Holladay declining to qualify for the position as director of the Oregon & California Railroad Company, and on pages 624 to 636 transcript, Vol. II, (page 192 of Exhibit 14, paragraph 1) it is shown that upon this date by an agreement in writing sell all his interest, which was the controlling interest in the Oregon & California R. R. Co. (See especially page 625)

Also see testimony of Mr. R. Koehler (pages 695, 696, 697 of transcript, Vol. II), where Mr. Koehler, in answer to question requesting him to explain fully the circumstances under which this Frankfort Committee agreement was made, stated:

“This agreement was made after we had seen the impossibility of getting along with Mr. Holladay who, up to this time, was still in control of the road. Further, that it was deemed best to adjust the matter by buying Mr. Holladay out”.

And in answer to the following question:

Q. “Was such an agreement in fact exe-

cuted by the parties who purported to have executed it?

“A. Yes.

Q. “What is the fact, if you know, as to whether or not the Oregon & California Railroad Company received the document in duplicate as stated in Mr. Villard’s letter, as appears in these minutes, at the time of the execution of the instrument as indicated in the minutes?”

A. “A copy of the agreement was received.”

Q. “Where was the agreement received, if you know?”

A. “From Mr. Villard.”

Q. “This letter referred to in this minute book, appears to be addressed to the board of directors of the Oregon & California Railroad Company and appears to be dated at Portland, Oregon, April 19, 1876, and this meeting apparently was held on the 19th day of April, 1876, the same day. Were you a member of the board of directors, and were you at this meeting?”

A. “I was.”

From this testimony it can hardly be said that this agreement was never in existence, especially when considered in connection with the following:

Exhibit 68 herein, see page 1042 of transcript Vol. II which is a certified copy of the deposition of Mr. Henry Villard taken in the case of Nightingale et al, vs. Oregon Central et al, wherein it appears that James L. King, a notary public, certified that on the 11th day of September, 1877, he com-

pared the foregoing copy of agreement (Frankfort Committee agreement) with the original thereof in the custody of the London & San Francisco Bank of San Francisco and that the same is a true, full and correct transcript therefrom and the whole of such agreement.

FIFTH: *Having clearly established the existence of this Frankfort Committee agreement, we will next consider defendant's objection that there is not sufficient evidence of its loss or evidence of a proper search having been made.*

As appears from what was just stated in the preceding paragraph, the original of this agreement was in the custody of the London & San Francisco Bank of San Francisco on the 11th day of September, 1877. (See page 1042 of transcript Vol. II).

From the testimony of Mr. R. Koehler (pages 698 and 699 of transcript Vol. II) he stated that as he understood it, this agreement was in the London & San Francisco Bank in San Francisco, California, which was a Bank in which Mr. M. S. Lathan, who was at the time the agreement was executed, president of the Oregon & California R. R. Co. kept his records, and that some time prior to the San Francisco fire in April, 1906, the London & San Francisco Bank was taken over by the Bank of California and these records were no doubt transferred to the Bank of California by the London & San Francisco Bank at this time.

SIXTH: It is further objected to as being in the nature of self-serving evidence.

This has been discussed to some extent hereinbefore. While it may appear that Exhibit 14 (Oregon & California minute Book) is in the nature of self-serving evidence, it becomes quite clear that it is nevertheless admissible by reading pages 160 to 208 of Exhibit 7 pages 393 to 440 of transcript, Vol. I in connection with pages 1 to 13 of Exhibit 14, wherein the same matters are referred to by both corporations. (see pages 496 to 499 of transcript Vol. I)

On pages 495 and 496 of transcript Vol. I (page 7 of Exhibit 14), appears a resolution dated March 26, 1876, which is the same as appears by copy upon page 170 of Exhibit 7. (pages 403 and 404 of transcript Vol. I) This was a resolution passed by the board of directors of the Oregon & California R. R. Co. *authorizing Ben Holladay to act as its agent to negotiate for the purchase of the Oregon Central.* This was an act, as has hereinbefore been shown, primarily initiated by Ben Holladay, who was at the time such resolution was passed, the principal stockholder in both the Oregon Central and the Oregon & California R. R. Co. See page 20 of Exhibit 14. (page 514 of transcript Vol. I pages 15 and 16 of Exhibit 26, (see bottom of page 1318 of transcript Vol. III and pages 1, 2 and 3 of Exhibit 52 pages 1475 and 1476 of transcript Vol. III).

The chief purpose, however, for which this exhibit was introduced, was to present to the Court the record of the Frankfort Committee agreement appearing upon pages 191 to 204 thereof. (pages 1026 to 1042 of transcript Vol. II)

To determine whether or not this can be said to be excluded as being self-serving evidence, depends upon whether or not it can be shown to be a record made with the knowledge of Ben Holladay. If it appears that he had knowledge of this agreement and that it was executed with his consent, then the rule that it is to be excluded as being self-serving evidence does not apply.

That it has been proven beyond question that such an agreement did exist, see pages 695, 696, and 697 of the transcript Vol. II, testimony of R. Koehler, who states in substance that he was present when the duplicate copy of this agreement was presented at a meeting of the directors of the Oregon & California R. R. Co. He also testified directly that the original was executed by the parties.

There also appears from the deposition of Mr. Henry Villard as one of the exhibits of the record (Exhibit 68) (See page 1042 of transcript Vol. II), that a copy of this agreement was attached to such deposition and certified to by James L. King, a notary public, as being a true copy of the original thereof in the custody of the London & San Francisco Bank of San Francisco.

It also appears from Mr. Koehler's testimony

that he was present when this agreement was signed by H. Hampton, Ben Holladay's attorney in fact (pages 696 and 697 of transcript Vol. II); also that Ben Holladay at this time sold out his entire interest in the Oregon and California R. R. Co.—see page 696 of transcript Vol. II; also paragraph 2 of page 192 of Exhibit 14 (page 625 of transcript Vol. II). In accordance with this, there appears upon page 614 of the transcript Vol. II (page 184 of Exhibit 14) a copy of a telegram from Ben Holladay stating that he declined to be re-elected as an officer of the Oregon & California Railroad Company.

All of these circumstances speak in very strong terms in favor of complainant's contention that Ben Holladay had knowledge of the existence of this Frankfort Committee agreement. In view thereof, upon what principal of law can it be held that the copy of this agreement appearing upon the records of the Oregon & California minute book is self-serving evidence and should therefore be excluded?

“In an action by a corporation as a holder of a first mortgage against the defendant, on his contract assuming to pay such mortgage, it was held proper to permit the corporation to put in evidence its constitution and by-laws, fixing the payments due on the mortgages, and an order of its board of directors authorizing an assignment to the defendant of the mortgage on his performing his part of the contract.”

Eigenman v. Rockport Bldg. & Loan Assn.
79 Ind. 41.

Furthermore, corporate records are admissible, and are prima facie evidence of the fact there stated, and particularly as to stockholders or persons dealing with such corporation.

WAS THIS FRANKFORT COMMITTEE AGREEMENT LOST AND HAS A PROPER SEARCH BEEN MADE TO LOCATE IT.

Referring to Exhibit 68 (see page 1042 of transcript Vol. II) herein, which has just been above referred to, it appears that this agreement was in the London & San Francisco Bank at San Francisco, California, on September 11, 1877. This establishes beyond any doubt that this agreement did exist.

This agreement was no doubt destroyed in the San Francisco fire of April 16, 1906, for the reason that it appears from the testimony of Mr. L. F. Steel, pages 852 and 853 of transcript) that he was unable to find the original of this agreement after making a search through the records of the Secretary's office of the Oregon & California R. R. Co., which is the place where such agreement would most likely have been if it were still in existence. It has already been shown that Mr. Steel was the custodian of records of this corporation under Mr. W. W. Cotton its secretary.

On pages 772 and 773 of the transcript Vol. II, from the testimony of Mr. B. A. McAllister, one of complainant's witnesses, it appears that he caused a search to be made through the files and storage places of the office of the Oregon & California R. R. Co., in San Francisco, for various documents pertaining to miscellaneous lands, and that he was unable to locate any of these papers, and that he had been informed that they were burned in the fire.

In this connection, see the testimony of Mr. W. D. Kelly, (pages 755, 756 and 757 of transcript Vol. II), where he states in substance that he was in the employ of the Oregon & California R. R. Co.'s Land Department in San Francisco, and that in connection with his duties he had access to various records and documents pertaining to miscellaneous lands. On page 757 the witness fully explains in just what manner he acquired his knowledge. He also states that just prior to the fire he saw a great many papers pertaining to miscellaneous lands in the office of the Company in the Merchant's Exchange Building, and that he later placed these papers in the vault. On page 595 this witness states that he has not seen any of these papers pertaining to these miscellaneous lands in the office of the Company since the fire.

We submit that the above facts show that sufficient search was made under the circumstances.

The fact that this agreement was executed so

many years ago and that many of the reasons for its ever having been executed have no doubt long since ceased to exist, and the further fact that no one of the heirs of Ben Holladay have, during all of these years, made any claim to these lands, are circumstances which would not call for any great degree of care in the preservation of such an instrument. Hence no extreme degree of diligence is required in making a search for this agreement.

“Where a document or writing is not required to be kept in some particular place, but where it is made to appear that it was last seen or known to be kept at a particular place, then it should be shown that a careful search was made where it was last known to be or where it was most likely to be found.”

McDonald v. Stack, 176 Ill. 456

Elliott on Evidence, Sec. 1466, Vol. 2.

Watson v. Richardson, 110 Ia. 673

In the case last above cited the Court said:

“Parole evidence as to the contents of a written contract is admissible where it is shown that it cannot be found among the papers of the person entitled to its possession.”

It was unnecessary to do more than show that the document was at one time in the possession of the company or its officer in charge, that a reasonably careful search has been made by the custodian of the corporate records and files, in the place where such records and files are kept, and that the instrument in question could not be found. This lays the foundation for secondary evidence.

ARE THE PLEADINGS IN THE CASE OF
JOHN NIGHTENGALE ET AL. VS. ORE-
GON CENTRAL RAILROAD COMPANY
ADMISSIBLE?

If it should appear that the matters and things set forth and contained in these pleadings or any of them, are of such a character as to amount to admissions upon the part of Ben Holladay against interest, when applied to the issues in the suit at bar, or if the facts show that Ben Holladay directed and controlled the litigation, thereby becoming a quasi party, then there is no rule of law or evidence by which they are to be excluded. There are many minor rules of evidence bearing upon the question, which, however, have no controlling force when complainant has shown,

First: That the pleadings were prepared by the direction of Ben Holladay, and that he had knowledge of the contents thereof.

Second: That he must have understood the matters and things related in such pleadings.

Third: That it would have been natural for him to have denied such matters if against his interest.

Fourth: That he had at the time those pleadings were prepared, adequate knowledge of the matters and things so related, as to have put him upon notice of the fact that the agreement of March 28, 1870, was thereto attached, and that his attorneys formally stipulated that the copy of the purported

agreement of March 28th, 1870, was a live copy of the original.

It is the purpose of complainant to show from the contents of these pleadings in connection with other circumstances, that Ben Holladay was thoroughly familiar with all of the facts, and that he was the person who directed the preparation of the Oregon Central Railroad Company and Oregon & California Railroad Company's answer to the bill of complaint therein. In the first place, an examination of the bill of complaint shows that while it is a suit against the Oregon Central Railroad Company and the Oregon & California Railroad Company, that it is also a general charge of fraud directed against Ben Holladay personally, stating that it was a deliberate plan of Ben Holladay to defraud the complainants out of certain interests they claimed to have had in the Oregon Central Railroad Company.

In order to fully understand that the matters and things set forth in these pleadings (Exhibits 51, 52, 53, 54 and 61-A, B, C) (see pages 1451, 1475, 1508, 1516 transcript, Vol. III), amount to admissions upon the part of Ben Holladay that the agreement of March 28, 1870, (the last agreement) was a reality and had been duly executed and acted upon, it will be necessary to examine the issues raised by the pleadings in said suit, to show their connection and relation to this lost agreement. (Being referred to in the suit entitled John Night-

engale et al. v. Oregon Central R. R. Co. et al., as Exhibit "G").

In the bill of complaint of said Nightengale et al. v. Oregon Central R. R. Co. et al. paragraph III, it is alleged as follows:

"That on or about the 7th day of September, 1869, without any consideration having been paid therefor, the said Oregon Central Railroad Co., by its, their directors, who *were the tools and confederates of Ben Holladay*, and who in all things pertaining thereto did his bidding, caused to be issued, nominally to said Ben Holladay, in the name of Ben Holladay & Co., 39,930 shares of its capital stock; that prior to the last mentioned day the said capital stock so as aforesaid issued to said A. J. Cook & Co. and held and controlled and owned by your orator, Elliott, was delivered to and duly transferred on the books of the corporation of the said Oregon Central Railroad Company, to the firm of Ben Holladay & Co., then composed of Benjamin Holladay, C. Temple Emmet, and your orator, Elliott, and the same was on said last mentioned day, and ever since has continued to be in the actual possession of Benjamin Holladay as the representative of and assuming to act in reference thereto, in the name of Ben Holladay & Co., composed of the individuals hereinbefore mentioned."

In subsequent paragraphs it is alleged that Ben Holladay organized the Oregon & California Railroad Company (see pages 174, 175 Exhibit 7, pages

406-407 of transcript, Vol. II) and had caused such company to absorb the Oregon Central Railroad Co., and in so doing, and as a part of Ben Holladay's fraudulent scheme, caused the dissolution of the Oregon Central Railroad Co., and caused all of its stock to be cancelled. (See paragraphs 13 and 14 of said bill of complaint, Exhibit 54, pages 1527-1528 of transcript, Vol. III).

As to further allegations charging fraud to Ben Holladay, see paragraphs 8, 9, 10 and 11 of said bill of complaint. (pages 1523-1524-1525 and 1526 of transcript, Vol. III).

In paragraph 22 (page 1533 of transcript, Vol. III) it is again generally alleged that Ben Holladay has uniformly and at all times controlled and shaped and determined the policy of the Oregon & California Railroad Co.

From these allegations directed against Ben Holladay personally, charging him with fraud and general bad faith and numerous irregularities, it is only natural to expect that when the answer of said Oregon Central Railroad Co. and said Oregon & California Railroad Co. was prepared, that he would be consulted. That he was so consulted, and that it was he who in fact directed the preparation of said answer and signed the same is made manifest when it is read in connection with Exhibit 7, pages 160 to 208. (pages 380 to 440 of transcript, Vol. I). We have already shown that it was the

mind of Ben Holladay who directed the various business transactions therein recorded.

An examination of the answer of the Oregon Central Railroad Company and the Oregon & California Railroad Co., in the suit of John Nightengale et al. against said companies, shows that the firm of Ben Holladay & Co. surrendered and delivered up to the Oregon Central Railroad Co. all of the property acquired in connection with the building of the Oregon Central railroad. (See pages 26 and 27, Exhibit 61-A, (pages 1581 and 1582 of transcript, Vol. III), where it is alleged that Ben Holladay & Co. transferred and conveyed unto the Oregon Central Railroad Co. all property, both personal and real, of every name and description, then owned by or standing in the name of Ben Holladay & Co., in Oregon, or in their possession and intended for use in and to be used in the construction of the said railroad.) *Here we have a direct allegation to the effect that this agreement of March 28, 1870, was executed by Ben Holladay, and by Ben Holladay & Co.* It would be impossible to believe that Ben Holladay did not have any knowledge of the fact that this agreement of date March 28, 1870, was a part of the answer of the Oregon Central Railroad Co., and the Oregon & California Railroad Co. in said suit, and that he did not fully understand its purport, especially as it also appears on page 28 of the answer immediately following, that a copy of it is marked Exhibit "G"

and made a part of the said answer. (See page 1583 of transcript, Vol. III)

This brings us to the main point by which complainant claims the connection and relation which said agreement signed by Ben Holladay & Co. on March 28, 1870, has to the issues in the suit between John Nightengale et al., and the Oregon Central Railroad Co. et al. Complainants John Nightengale and S. G. Elliott were endeavoring to recover certain stocks which they claimed had become their property by reason of their connection with the firm of A. J. Cook & Co., who had received two million dollars in capital stock of the Oregon Central Railroad Co. in part consideration for their promises and undertakings set forth in the agreement of A. J. Cook & Co. to construct a railroad for the Oregon Central Railroad Co. (See Exhibit 21, page 4, page 1160 of transcript, Vol. III).

In order to show that any claims which these complainants were asserting in this suit against the Oregon Central Railroad Co. and the Oregon & California Railroad Co., were barred, it was the purpose of Ben Holladay and the defendants named in said suit, to show that the firm of Ben Holladay & Co., which had become the successor of the firm of A. J. Cook & Co. had, *by the agreement of March 28, 1870, conveyed all of the property of every kind and description then belonging to the firm of Ben Holladay & Co., unto the Oregon Central Railroad Co., and in addition thereto had surren-*

dered all of the stock of the Oregon Central Railroad Co. then in their possession. It is to be borne in mind at this point that the railroad of the Oregon Central Railroad Company was not completed as per the terms of the original contract with A. J. Cook & Co., and that A. J. Cook & Co. had done very little work in connection therewith up to the time Ben Holladay & Co. assumed such contract. That in consideration of such transfer the Oregon Central Railroad Co. was to pay unto Ben Holladay & Co. the sum of \$800,000. (See pages 164-165, Exhibit 7; also pages 410-411 and 412 of transcript, Vol. I). This brings out very clearly the importance of making this agreement of March 28, 1870, (the lost agreement), an exhibit in said Nightengale suit. The important question, however, is, did Ben Holladay see this agreement, and did he know and realize that it was an agreement which in general terms agreed to convey unto the Oregon Central Railroad Co. all of the real estate in the State of Oregon belonging to the parties who signed same,—which agreement contains the following clause: “It being the intention of this conveyance to transfer to the said Oregon Central Railroad Co. all property, real and personal, of every name and nature, now owned or possessed by the undersigned, in the State of Oregon.” (See pages 175, 176, Exhibit 7; also pages 408 and 409 of transcript, Vol. I).

On page 28 (see page 1583 of transcript, Vol.

III) of the answer to the bill of complaint in the said suit, (See Exhibit 53) it is admitted that this agreement of March 28, 1870, is made a part of said answer. This answer was signed by the Oregon Central Railroad Co., by Ben Holladay, as President. It also appears that at the time this answer was prepared, that Ben Holladay was a holder of a majority of the stock of the Oregon & California Railroad Co., and that he was in control of its affairs. (See page 1 of affidavit, Exhibit 53; also page 1476 of transcript, Vol. III).

Keeping in mind the matters just referred to, and considering certain parts of the affidavit of Ben Holladay (Exhibit 52) on file in the same suit, it becomes very evident that it was he who supplied the facts of the said answer. A reading of this affidavit discloses, as has been contended heretofore, that Ben Holladay was at the bottom of each and every transaction recorded upon pages 160 to 208 of the minute book (Exhibit 7, pages 380 to 440 of transcript, Vol. I). This affidavit rehearses a great many matters which appear upon said pages, which are also referred to in the bill of complaint and answer. (Exhibits 54, and 61-a, pages 1516 and 1548 of transcript, Vol. III). These matters are so closely connected with the lost agreement signed by Ben Holladay & Co. as to be inseparable. Indeed, Ben Holladay personally relies upon and causes the agreement of March 28, 1870,

to be pleaded as a part of the defense against the charge of fraud made against him.

On pages 1, 2 and 3 of this affidavit he makes statements showing that he had knowledge of the preliminary matters preceding the signing of the said lost agreement of date March 28, 1870, pages 1475-1477 transcript, Vol. III. On page 4, (page 1480 transcript, Vol. III) he makes special reference to the meeting of the stockholders of the Oregon Central Railroad Co. held on March 28, 1870, at which the said lost agreement was signed by Ben Holladay & Co., and on pages 7, 8, 10, and 21, (pages 1485-1488 transcript, Vol. III) this same meeting is again referred to. On page 10 (page 1487 of transcript, Vol. III) in connection with the statement of other matters which occurred upon the 28th and 29th days of March, 1870, he states that the deed which was executed by the Oregon Central Railroad Co. conveying its property of every kind unto the Oregon & California Railroad Co., was referred to and made a part of his affidavit. Numerous recitals contained in this deed of March 29, 1870, from the Oregon Central Railroad Co. to the Oregon & California Railroad Co. directly bear upon the signing of the said lost agreement, and preclude the conclusion that Ben Holladay did not know and fully understand that the said lost agreement mentioned did not agree to convey unto the Oregon Central Railroad Co. all of the real property in the State of Oregon belonging to Ben Holla-

day & Co., on that date, and that the lands in dispute here were a part thereof. If there be any doubt that he did not so understand, a reading of the affidavit will readily remove it.

These circumstances clearly show that as to the defendant in the suit at bar, the pleadings in the suit of John Nightengale et al. v. Oregon Central Railroad Co. et al., may be received in evidence as admissions against interest. Ben Holladay could not himself dispute his own admissions, then made. His devisee and heir, is equally bound.

ADMISSIONS, GENERALLY.

An admission may be defined as a statement or act which amounts to an affirmance of some fact material to the issues, where such affirmance would be against the interest of the party making it.

McKelvey on Evidence, Sec. 90.

This principle may be applied to the facts just above related. When Ben Holladay in his affidavit stated that a copy of the deed from the Oregon Central Railroad Co. to the Oregon & California Railroad Co. was made a part of such affidavit, he thereby affirmed that the Oregon Central Railroad Co. was conveying unto the Oregon & California Railroad Co. all the real property in the State of Oregon that had theretofore been conveyed unto the Oregon Central Railroad Co. by Ben Holladay & Co., on the 28th day of March, 1870. This has

been clearly pointed out heretofore. (See pages 1486 and 1487 of transcript, Vol. III).

An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant, or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding.

Stephen's Digest, Article XV.

On pages 956 of Volume XVI CYC, the following general rule is stated:

A statement made in the presence of a party, but not connected with his conduct at the time when it was made, is mere hearsay, and not evidence against him of any fact narrated in such statement; but where a definite statement of a matter of fact is made in the presence or hearing of a party, so that he understands it, in regard to facts affecting *him* or *his rights*, and the statement is of such a nature as to call for a reply, and the party addressed is possessed of knowledge concerning the matter referred to, enabling him to reply if inclined to do so; and the nature of the statement, the right to information of the person who makes it, or other circumstances, are such as to render a reply proper and natural, the statement, in connection with a total or partial failure to reply, is admissible evidence tending to show a concession of the truth of the facts stated.

"And the general doctrine is that the declarations of a party to the record, *or of one*

identified in interest with him, are as against such party, admissible in evidence. The law in regard to this source of evidence looks chiefly to *the real parties in interest*, and gives to their admissions the same weight as though they were parties to the record."

Greenleaf on Evidence, Secs. 171-180, Vol. I, 15th Ed.

Fickett v. Swift, 41 Me. 65, 68

A reading of Ben Holladay's affidavit, especially the parts hereinbefore particularly referred to, removes all doubt as to his being identified with matters and things contained in the pleadings in the suit entitled "John Nightengale et al. v. Oregon Central Railroad Co. et al.", and that he was the principal party in interest.

It cannot be seriously argued that Ben Holladay's affidavit is not admissible, as a reading of it in connection with the answer filed in the said suit, will show that it contains many admissions against interest, which are material to the issues in the present case.

"The affidavits and depositions of a party are of course competent to show his admissions, although used in another suit, *and from their solemn character are entitled to great weight.*

Jones on Evidence, Sec. 274, Pocket Ed. and cases cited, note 72

Respondent being in privity with Ben Holladay, she is barred by these admissions.

“A declaration emanating from the claimant of any right or estate, which afterwards comes to the parties on the record by descent or purchase, affecting adversely the estate acquired, may be given in evidence against the party to the record who claims the estate.”

Gaines v. Rief, 12 Howard, (U. S.) 472, 531

Dodge v. Freemans Savings Bank, 92 U. S. 379

“Admissions made by a grantor before he parted with the legal title being contrary to his interest, are competent evidence against him, and those claiming under him.”

Bowen v. Chase, 98 U. S. 254, 262, 263

Baker v. Humphrey, 101 U. S. 494, 499

THE GENERAL RULE AS TO ADMISSIONS IN OTHER SUITS.

“Where one is not a party to the suit, nor in privity with one who is a party, and *not interested in the issue either personally or in a representative capacity, his declarations or admissions* are not as a general rule admissible in evidence.”

Ency. of U. S. Supreme Court Reports, Vol. 5, p. 228, Sec. 13, note 77

This concise statement of the general rule contains the general exception, and clearly sustains appellant's contention that the pleadings in the John Nightengale et al. v. Oregon Central Railroad Co. et al., suit are admissible against the defendant.

“If a person have peculiar means of knowl-

edge of a fact, and makes a declaration of that fact which is against his interest, it is evidence against him after his death, if he could have been examined to it in his lifetime."

Ency. of U. S. Sup. Court Reports, Vol. 2,
page 229, Sec. 2, note 81

These general principles are in harmony with complainant's theory that the facts and circumstances just related are of such a character as to have called for a denial from Ben Holladay if the agreement of March 28, 1870, was not intended as an agreement to convey the lands in dispute herein, unto the Oregon Central Railroad Co. He not only did not deny such fact, but defended his action and the action of his company upon the ground, among others, that the agreement of March 28, 1870, was a bona fide, valid contract, the consideration for which he had received.

PROOF OF LOSS OF AGREEMENT OF MARCH 28, 1870, SIGNED BY BEN HOLLADAY & CO. AND BEN HOLLADAY.

After having shown that the agreement of March 28, 1870, was signed and delivered by the firm of Ben Holladay & Co. unto the Oregon Central Railroad Co. on said date, as alleged in paragraph 8 of complainant's bill of complaint, it is now incumbent upon complainant to show that the original of this agreement is not now in the possession of complainant, and that its whereabouts is un-

known, and that it has in all probability been lost or destroyed.

As stated by an eminent author on the law of evidence, (See Sec. 1451, Elliott on Evidence, Vol. 2).

“The variety of facts and circumstances attending each different case renders impossible, or at least impracticable, the statement of a rule that may fit in all cases. * * * Each case depends more or less upon its own peculiar circumstances, and these circumstances must suggest the extent and thoroughness of the search. * * * As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, the party seeking to introduce the secondary evidence need not, on ordinary occasions, make a search for the original document as for stolen goods, nor need he be in a position to negative every possibility of its having been kept back.”

Citing *Christy v. Kavanagh*, 45 Mo. 375

It may, however, be premised, that, if we have shown that Ben Holladay admitted or acted upon, the copy set out in the corporate records, or in the Nightingale suit as and in lieu of the original, and thereby admitted the execution of the original, it is legally unnecessary to otherwise prove its execution, or account for its loss.

The general rule as to the sufficiency of the proof of loss of an instrument to admit secondary evidence is also stated by this same author, as follows:

“The object of the rule requiring strict proof

of loss and diligence of search, is to prevent a party to the action from perpetrating a fraud on his adversary by withholding the documents and writings, which, if produced, would not support his contention and would reveal the fraudulent design."

See also Wigmore on Evidence, Section 1192.

To the same effect is Section 558 of Volume I of Greenleaf on Evidence, where this author says:

"But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

"It should be recollected, that the object of the proof is merely to establish a reasonable presumption of loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, *or is ancient*, a less degree of diligence will be demanded, as it will be aided by the presumption of loss of which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the court."

There are certain facts in the record which, when tested by the above rule, will sufficiently overcome the defendant's contention that no foundation has been laid for the introduction of secondary evi-

dence showing the existence of this agreement of March 28, 1870. That this agreement is not now in the possession of the Oregon & California Railroad Co., and that it has no doubt been lost or destroyed, is evidenced by the testimony of the following witnesses:

First: Luther F. Steele testified that he was custodian of the records of the Oregon & California Railroad Co. under Mr. W. W. Cotton, who was secretary of said company. (See pages 466-467 of transcript) and (on page 851 of transcript, Vol. II), that he had made a search through the records of the office of the secretary, where any such documents would be likely to be found; that he had been unable to find it. He also stated that he had never seen it. On said pages 466 and 467, he further states that he had been custodian of the records of the Oregon & California Railroad Co., under Mr. Cotton, since 1905. If this agreement had been among the records of the complainant, it no doubt would have been seen by this witness, as it was his particular duty to look after documents of this character and keep a record thereof.

Second: B. A. McAllaster, a witness called by the complainant, stated that he was Land Commissioner for the Oregon & California Railroad Co., and that his duties were in part to look after the miscellaneous lands, payment of taxes, and straightening up of the records pertaining thereto. On being asked if he had made a search for this agreement,

he stated: "I have had the files and storage vaults at our office thoroughly searched, time and again, for all of these documents, without being able to find them." (See page 773 of transcript, Vol II).

Third: C. W. Eberlein, a witness called on behalf of the defendant, testified (relative to this lost agreement) in substance that he was appointed Land Agent for the Oregon & California Railroad Co. in 1903; that his duties were the straightening up of all land matters, and that he had made a list of all the lands of the company. (See pages 803-804 of transcript, Vol. II), and that he did not recall ever having seen this agreement. This witness was shown a copy of the said lost agreement, as appears upon pages 175, 186 of Record. (See pages 828 and 829 of transcript, Vol. II).

Fourth: Henry Conlin, a witness called by complainant, stated that he was Acting Land Agent from June, 1908, until September, 1908, and that he had been since 1905, prior thereto, in the employ of the Oregon & California Railroad Co. in a clerical capacity. (See pages 909 to 910 of transcript, Vol. II). On pages 915 and 916 this witness states that he had never seen nor heard of any such document until he saw it set out in the bill of complaint.

If this agreement had not been lost or destroyed, and was in the possession of the complainant, it would not have escaped the attention of all the

above named witnesses, especially that of Mr. Luther F. Steele, who stated that he had made a particular search for this instrument, and that it was his particular duty to look after such documents.

On pages 607 to 611 of the transcript, Vol. I, there is set out a copy of Complainant's Exhibit 16, which is a list of numerous documents and packages of papers which were delivered to W. W. Cotton, Secretary of the Oregon & California Railroad Co. by George H. Andrews, his predecessor. On pages 604 and 605 of the transcript, Vol. II (testimony of Luther F. Steele) it appears from a memorandum made by Miss Luckey, Mr. Cotton's private secretary, dated March 13, 1905, that all of these documents, packages of papers, etc., were delivered to J. N. Willicut, who was Secretary of the leased lines of the Southern Pacific Company, and which included the Oregon & California Railroad Co. (See page 605 of transcript, Vol. I). A search was made by Mr. Steel for the receipt of Mr. Willicut, but it could not be found. (See pages 728 to 732 of transcript, Vol. II). He did, however, find a receipt from Wells-Fargo Express Co. showing that eight boxes of books and records were shipped to San Francisco on March 13, 1905, to Mr. Willicut, as is stated in the memorandum made by Miss Luckey.

It further appears from Mr. Steele's testimony, and from Exhibit 16 (pages 602 to 611 of transcript, Vol. II), that the deeds from Grindley and

Gardner Elliott to Ben Holladay & Co. appear to have been among the papers and other documents sent to Mr. Willicut on March 13, 1905. (See Nos. 26 and 31 of this list, pages 608 and 609 of transcript, Vol. II). In addition to the various papers and documents enumerated in the list of papers delivered to Mr. W. W. Cotton by Mr. Andrews, and as appears to have been sent to Mr. Willicut, as above stated, it is also stated, page 34, page 610 of transcript, Vol. II, that box No. 4 contains, among other items, one package of numerous papers, also one tin box, key to which is lost, contents unknown; that it was filed in box No. 4, and marked OCRR Co., Secretary's records. This fact, considered in connection with the fact that the deeds from Grindley and Elliott, Nos. 26 and 31, (See pages 608 and 609 of transcript Vol. II) were listed in this Schedule of deeds transmitted to W. W. Cotton by George H. Andrews,—all of which appear to have been sent to Mr. Willicut by Mr. Cotton—are together a combination of circumstances from which an inference may be drawn that the agreement of March 28, 1870, the alleged lost agreement (being so closely related in point of time, and to Ben Holladay's dealings with the Oregon Central Railroad Co.) was in this box, and that it was sent to Mr. Willicut at San Francisco, on the 13th day of March, 1905.

The complainant's position is that this instrument of date March 28, 1870, was, no doubt, de-

stroyed in the great fire and conflagration which occurred at San Francisco, in April, 1906. From the testimony of W. D. Kelley, who was an employee of the Land Department of the Oregon & California Railroad Co., it appears that a great many instruments and records of the company pertaining to miscellaneous lands, were destroyed. (See pages 751 to 757 of the transcript, Vol. II) that Mr. Kelley's position was such that he would have access to records pertaining to miscellaneous lands. (See testimony of C. W. Eberlein, pages 903 to 908 of transcript, Vol. II); also pages 752 and 753 of Record, where the witness, Kelley, shows personal knowledge as to the location of various papers pertaining to the miscellaneous lands of the company prior to the fire; also that he had knowledge of the contents of the vault wherein these documents were kept, soon after the fire, and that Mr. Henry Conlin assisted in an attempt to save various papers, etc., which were kept in this vault.) (See page 757 of transcript, Vol. II).

On pages 752 and 753 of transcript, Vol. II, Mr. Kelley stated in substance that a great many deeds and other papers, including those which had been received from Mr. Eberlein (see Exhibit 9, pages 474 to 488 of transcript, Vol. I), were at the time of the fire, in the office of the Oregon & California Railroad Co. Land Department, in the Merchants Exchange Building, San Francisco.

In view of the rules just above stated relative

to the proof necessary to establish the loss of the instrument, it would be difficult to determine what other proof could be asked for, in addition to the testimony of the above named witnesses. The whole theory upon which the law relative to the proof of the contents of lost documents is based, is that there is great danger of fraud being practised, and that valuable rights might be wrongfully acquired if great care were not exercised in admitting secondary evidence to prove the existence of such documents. In short, it is the purpose of the court in such matters to detect any fraudulent schemes which might be planned by a person claiming rights by reason of the alleged prior existence of some writing.

In the present case it would be difficult to decide upon what theory the defendant could ask the court to conclude that there was any attempt to perpetrate a fraud upon the defendant. There has not been one single act or circumstance related which would be ground for the slightest suspicion as to the due existence, execution, and delivery of this agreement by Ben Holladay and Ben Holladay & Co. on March 28, 1870. The only circumstance to which defendant can refer as being the basis for any suspicion or doubt as to the existence of such agreement, is that the original could not be produced. That the copies in the record are genuine has been clearly demonstrated, and the court certainly would not be justified in concluding that no

such agreement ever existed, in view of the fact that the defendant has not even attempted to prove that the copies so introduced were not all that they purported to be. In the absence of any showing being made by defendant that there was any fraud connected with the preparation or production of the copies of this agreement of March 28, 1870, or in the production of any other secondary evidence, the search made for such agreement has been more than would ordinarily be required.

“The search for a lost instrument is governed by the circumstances of the case. If suspicion hangs over the instrument, or it appears that it is designingly withheld, a more rigid inquiry should be made into the reason for its non-production. Where no such suspicion exists, all that ought to be required is reasonable diligence to obtain the original.”

Minor v. Tillotson, 7 Peters (U. S.) 99

See also

Mandewitte v. Reynolds, 68 N. Y. 579

V.

WERE THESE LANDS PURCHASED BY BEN HOLLADAY & CO., A CO-PARTNERSHIP?

Considerable importance has been attached to the necessity of complainant making some showing that these lands in controversy were purchased by Ben Holladay & Co. as a co-partnership. We submit, however, that it has been clearly and sufficiently shown that they were so purchased. Certain facts have been heretofore related to show that these lands were purchased primarily for the use and benefit of that firm and for use in the construction of the Oregon Central Railroad, and to aid in establishing such fact, complainant incidentally proved that they were purchased by Ben Holladay & Co., a co-partnership, which, as has been shown, was formed for no other purpose than for the building of the Oregon Central Railroad. No time will be taken up in rehearsing these facts hereinbefore referred to, which leaves no room for doubt that the Grindley and Elliott tracts were purchased by Ben Holladay & Co., and that Ben Holladay & Co. in turn agreed to convey them to the Oregon Central Railroad Co.

There seems to be no dispute that whatever interest Ben Holladay personally had in such lands on the 28th day of March, 1870, whether it be all or a part thereof, was in equity agreed to be conveyed to the Oregon Central Railroad Co.

“A conveyance of real property which is the property of a partnership conveys all the interest

of the member of such partnership who signs the conveyance.”

Robinson Bank v. Miller, 153 Ill. 244

“A deed made to a partnership in the firm name, without naming as grantees the individual partners, *is good in equity*, and, by implication, vests in the members of the firm the power to convey; and hence such deed is admissible as a muniment of title, in favor of one who claims title to the land in question through the grantee of such partnership.”

Dunlap et al. v. Green, 60 Fed. 242

“The *legal title* to real estate can never vest in a partnership as such, but is in the partners as tenants in common. Upon the dissolution of an insolvent partnership, however, by the death of one of the partners, the survivor may convey such an equitable interest in the entire property as will enable his vendee to compel a conveyance by the heirs of the deceased partner of the legal title to the interest of their decedent.”

Bank of Southwestern Georgia et al. v. McGarah, 120 Ga. 944

If the legal title vested in the members of the firm of Ben Holladay & Co., it vested in Ben Holladay, C. Temple Emmet and S. G. Elliott, and the contract of March 28, 1870, signed by Ben Holladay & Co. and Ben Holladay, equitably bound the firm, and legally bound Holladay. The defendant can claim no interest excepting through *Ben Holladay*.

VI.

ADVERSE POSSESSION.

If it be the opinion of the court that complainant has not shown that it is now the holder of the equitable title to the lands in question, from what has been hereinbefore stated, or for any other reason, then the complainant contends that it is still entitled to prevail in this suit as against defendant, by reason of the fact that it and its predecessors in interest have since the 28th day of March, 1870, been in possession of the lands continuously, openly, notoriously, and adverse to the claim of defendant, under color and claim of title.

Before discussing the various acts upon which complainant relies as giving it title to the lands in question by adverse possession, the court will be asked to consider that at the time complainant went into possession of these lands under the agreement of March 28, 1870, from the Oregon Central Railroad Co., and for several years thereafter, they were of very little value; that their value at the time they were purchased, to-wit, March 28, 1870, was based primarily upon the value of the timber thereon, and that after the timber was removed they would be of so little value that complainant would not have been justified in making any permanent improvements, and that the possession taken was such as their value, uses and purposes justified.

ACTS EVIDENCING OWNERSHIP AND POSSESSION.

PAYMENT OF TAXES:

The taxes on these lands have been paid by the Oregon & California Railroad Co. since the year 1873, to 1910 inclusive. This is evidenced by the testimony of a number of witnesses for complainant, as well as by documentary evidence. The first witness called by complainant who testified upon this question, was Mr. R. B. Halleck, who testified that he had been employed in the Tax Department of the Oregon & California Railroad Co. since 1895, under J. W. Morrow, Tax and Right of Way Agent; that his duty was to check up and certify to the various tax files and vouchers; that in this way he had become acquainted with the various lands upon which the company had paid taxes. (See pages 212 to 220 of transcript, Vol. I). That in the spring of each year it was the custom of the company to compile a list of all the property owned by it in the various counties, and send same to the County Assessor, and that when it had been determined what each parcel of land had been assessed at by the various County Assessors, it was his duty to revise the figures and check them up against the tax roll; that he had examined the records of Clackamas County as to assessments made against the lands in question here; that he assisted Mr. Hanselman, of the Tax Department, in Mr. Morrow's office, and the County Clerk of Clackamas County

(Mr. Mulvey) in checking up and preparing a copy of the tax records of said county, showing what lands were assessed to the Oregon & California Railroad Co. and upon what lands taxes had been paid by said company. (See Complainant's Exhibit 6, which is a statement of the tax roll of Clackamas County, certified to as such by Mr. Mulvey).

On page 216 of transcript, Vol. I, this witness states that he has personal knowledge of the payment of taxes since the year 1908.

Mr. Halleck's testimony relative to preparation of Complainant's Exhibit 6 is corroborated by Mr. Hanselman, who testified that he was a clerk in the Tax & Right of Way Department of the Oregon & California Railroad Co. (See pages 443 to 445 of transcript, Vol. I; also testimony of W. L. Mulvey, County Clerk of Clackamas County, pages 777 to 802 of transcript, Vol. II, showing that the taxes were paid each year beginning with the year 1873 to 1910, by the Oregon & California Railroad Co., with the exception of the year 1877; see also testimony of B. A. McAllaster, pages 764 and 765 of transcript, Vol. II.

It appears from Complainant's Exhibit 67 that for some years vouchers have been made out by the Oregon & California Land Co. in payment of taxes. On pages 767 and 768 of the transcript, Vol. II, it is explained by the testimony of B. A. McAllaster that this would not indicate that the taxes were not paid

by the Oregon & California Railroad Co., for the reason that the Oregon & California Land Co. was simply a holding company for the Oregon & California Railroad Co. (See Exhibits 62, 63, 64, 65, 66, which are original tax receipts for the taxes paid on the lands in question, for the years 1906 to 1910).

MISCELLANEOUS ACTS OF OWNERSHIP.

There is some evidence introduced tending to show that these lands were fenced some time in the early seventies, and prior to 1905, when they were enclosed by the Anchor Fence Co. under contract with the Oregon & California Railroad Co. Edward S. Elliott (see page 181 of transcript, Vol. I), states that in 1868 or 1869, there were indications of an old fence. David Loring, civil engineer, stated that he and Mr. Andrews went upon the lands some time in 1894, and noticed a fence on the East boundary, running north and south. (See pages 132 and 133 of transcript, Vol. I). He stated further that he went upon these lands a few days prior to giving testimony, at the request of Mr. Fenton, and found two fences which joined at the northeast corner of the Grindley tract, one of which was a barbed wire fence, and had been built within recent years; and another a board fence which had been in existence for a great many years. Also saw evidence of old fence on other boundary lines

of these same tracts. (See pages 134 to 136 of transcript, Vol. I).

On page 157 of the transcript, Vol. I, Mr. N. E. Britt testified that he was caretaker of these lands, and that in 1889 or 1900, he recalled seeing an old fence on the east boundary line of the Elliott tract.

Samuel E. Wishard stated that during the time these lands were being used by Ben Holladay & Co. for mill sites, he was foreman at the shops of the Oregon Central Railroad Co. (page 119 of transcript, Vol. I). He further stated that he made a recent investigation, and saw evidence of old fences. (See page 120 of transcript, Vol. I).

Sidney Smyth, another witness called for the complainant, stated that he was upon the land in 1894, for the purpose of making a survey, and at this time he saw old fences, especially on the north line. (See pages 457 and 458 of transcript, Vol. I).

From the statements of these witnesses it appears that these lands were fenced prior to the year 1905.

Quoting further from the testimony of Mr. Sidney Smyth, it appears that in 1890, to 1894, he was County Surveyor for the County of Clackamas; that in 1894 he made a survey of this land at the request of Mr. George H. Andrews, who was at that time Acting Land Agent of the Oregon & California Railroad Co. (See page 456 of transcript,

Vol. I.) That he was paid for such work by the Oregon & California Railroad Co. (See page 458 of transcript, Vol. I). He further stated that at the request of Mr. Fenton he went upon the land a few days prior to giving testimony, and located the iron pipes evidencing this survey of 1894. (See pages 456-457 of transcript, Vol. I).

On pages 686 and 687 of transcript, Vol. II, Mr. Koehler stated that in the early seventies he was in charge of the lands of the Oregon & California Railroad Co., and that at this time he remembers having seen a plat of these lands in the offices of the company, and that they were of record as being part of its property. (See pages 705 and 706 of transcript, Vol. II.) He further states that in 1890, 1899 or 1900, he went upon the lands for the purpose of securing wood for locomotive purposes. (See page 709 of transcript, Vol. II) and that some time prior to the year 1900 he recalls having sold gravel from these lands to the County of Clackamas. (See pages 710 and 711 of transcript, Vol. II.) That wood and gravel were sold by the company from these lands, see testimony of A. N. Wills, pages 205 and 206 of transcript, Vol. II; also testimony of Con E. Battin, one of defendant's witnesses, who stated that he recalled that wood had been sold by the Oregon & California Railroad Co. from these lands; also that they had sold gravel to the County of Clackamas. (See page 953 of trans-

cript; also testimony of Orrin A. Battin to the same effect, page 971 of transcript, Vol. II)

From the testimony of N. E. Britt it appears that he was employed by the Oregon & California Railroad Co. about the year 1888, and continued in its employ until about 1905, 1906 or 1907; that his duties were to look after miscellaneous lands, and that he was connected with the land department. (See pages 153 and 154 of transcript, Vol. I).

He made inspection of these lands in question at various times, to see that there were no trespassers upon same. (See pages 154 and 155 of transcript, Vol. I). He also states that he was under the supervision of Mr. George H. Andrews, who was Land Agent at the time; that he always understood that these lands belonged to the Oregon & California Railroad Co., and never heard of anyone making any claim to them. (See pages 162 and 163 of transcript, Vol. I).

Mr. C. W. Eberlein testified that during his connection with the Oregon & California Railroad Co. he always understood that these lands were the property of the company. (See pages 811 and 812 of transcript, Vol. II). To the same effect, see testimony of Orrin A. Battin, one of the defendant's witnesses, pages 970-971 of transcript).

RECEIVERSHIP PROCEEDINGS.

That the Oregon & California Railroad Co. has been recognized as the owner of these lands, and has had possession of the same, is evidenced by the record in the case of Lawrence Harrison et al vs. Oregon and California Railroad Company et al. In this suit R. Koehler was appointed Receiver of the properties of the Company. (See pages 725 and 726 of transcript Vol. II) As such Receiver he took possession of all the property of the company, and filed a report which contains a schedule designated as "L", which was a list of the miscellaneous lands owned by the Oregon & California Railroad Co. This list includes the lands in controversy here. (See Complainant's Exhibit 10, which is a certified copy of the order appointing R. Koehler as Receiver, and which was certified to by G. H. Marsh, Clerk of the United States Circuit Court, and was identified by him at the time produced. (See pages 669, 670 and 671 of transcript Vol. II;)) (also pertaining to the same proceedings, see Exhibits 11 and 12 see pages 670-671 of transcript Vol. II)

There was evidence introduced to show that these lands were fenced in 1905 by the Anchor Fence Co. Considerable importance is given to this incident by counsel for the defendant. He contends that these fences were built for and on behalf of the Oregon & California Land Company. An examination of Exhibit 45, pages 1380 to 1384

of transcript Vol. III which is the correspondence relative to the building of this fence, shows that the fence was built by the Anchor Fence Co. and was paid for by the Oregon & California Railroad Co., and that it was in fact built at their request.

From the testimony of B. A. McAllister it appears that the Oregon & California Land Company was simply a holding company for the Oregon & California Railroad Co. (See pages 767 to 768 of transcript Vol. II) For this reason this incident should not have any bearing upon the question of ownership. These lands were the property of the Oregon & California Railroad Co. at the time these fences were built, and have been so owned since March 29th, 1870, the time the Oregon Central Rail Road Company conveyed the premises to the Oregon and California Rail Road Company.

While the law relative to the acquiring of title by adverse possession seems to require some evidence of actual exclusive and continued possession, it is, like all other rules of law, controlled to some extent by the circumstances of each particular case. The character of the possession, is determined by many circumstances.

“The evidence necessary to establish actual adverse possession varies in each particular case, much depending upon the situation of the property, and the use to which it may be applied.”

Bowen v. Guild, 130 Mass. 123

It is not necessary that there be evidence of occupation, cultivation, or any permanent improvement.

“It is not the particular use made of the land, or whether built upon and used as a residence, or cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations, which show a visible, open and exclusive possession and use of the land.”

Mooney v. Cooledge, 30 Ark. 655

Applying the rule just stated to the evidence relative to the location, condition, and general character of the lands in dispute, it would seem that complainant has done all that is necessary under the circumstances. There should be no harsh or technical rule of law applied to deprive the complainant of its rights to these lands, simply because it has seen fit to hold them until such time as they could be disposed of to an advantage, and until such time as justified their actual enclosure.

While it is generally held that the payment of taxes alone in and of itself is not such an act of ownership as will establish title to lands by adverse possession, it is to be considered in connection with other circumstances. And long continued payment of taxes, accompanied by such general knowledge of claimed ownership in the community, such as to put the absent owner of the legal title on inquiry, is sufficient.

“Payment of taxes, together with other acts of ownership and circumstances, indicate a possession. The payment of taxes may be considered as evidence of the claim of ownership.”

Greene County v. Eubanks, 80 Ala. 204

Rayner v. Lee, 20 Mich. 387

Murray v. Hudson, 65 Mich. 676

McClure v. Jones, 121 Pa. St. 151

In the suit before the court, where it is shown that complainant has paid the taxes for so many years, such fact should be given great weight as tending to establish title as against defendant, especially where it has been shown that the taxes were no doubt paid with the knowledge and consent of Ben Holladay, for the years from 1873 to 1876. (See pages — to — supra)

“Where a defendant in ejectment received a warranty deed for the land in 1859, and paid all taxes thereon from the year 1859 to 1879 inclusive, and the proofs showed that it was timber land, and was never enclosed, and that he used it every year after the date of his deed, as occasion required, in procuring therefrom rails, fire wood, posts, etc., it was held that whether the land was in possession or vacant and unoccupied, the bar of the statute was complete.”

Walter v. Gibbs, 97 Ill. 118

The fact that these lands were completely enclosed in 1905 so as to make the adverse possession

beyond question, should not destroy the previous rights then vested and running.

That the various acts above enumerated are sufficient to justify the court in concluding that the complainant has established title to the lands in dispute, is held in *Worthley v. Burbanks*, 46 Ind. 534, where the court says:

“Adverse possession of unproductive land is shown by the recording of deed under which the occupant claims, payment of taxes, cutting of all the valuable timber, going upon the land at intervals, claiming absolute ownership, the employment of agents in the neighborhood to look after it, and the building of a brush fence around the portion cleared, without proof of actual occupancy.”

“What is adverse and exclusive possession, and what is an interruption of such possession, depends very much upon the character of the land and the purpose to which it is adapted, and for which it is used. Although there may be cases in which the occupation of the true owner may be of such a nature, and so continued, that it would be the duty of the court, upon the truth of such facts being apparent, to rule as a matter of law that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous, or has been interrupted.”

Stevens v. Taft, 17 Gray, 33

O'Hara v. Richardson, 46 Pa. St. 385

Groft v. Weekland, 34 Pa. St. 304

“Neither actual occupation, cultivation, or residence is necessary where the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership; that much depends upon the situation of the property, and the use to which it can be applied, or to which the owner or occupant may chose to apply it.”

Mooney v. Cooledge, 30 Ark. 655

Vol. 3, Washburn on Real Property, p. 134

“It is well settled that to constitute an adverse possession there need not be a fence, a building, or other improvement made. It suffices for this purpose that visible notorious acts are exercised over the premises in controversy, for thirty years after an entry under a claim and color of title.”

Ellicut v. Pearl, 10 Pet. 412

“Where acts of ownership have been done upon lands which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse entry by him for twenty-one years, such acts are evidence of an ouster of the former owner, and of an actual adverse possession against him; if the jury think that the property was not susceptible of a more strict and definite possession than had been so taken and held. Neither actual possession nor cultivation, are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement; and the continued

claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and could not exercise over property which he did not claim."

Ewing v. Burnet, 11 Pet. (U. S.) 41

Houlahan v. Mining Co., 34 Colo. 365

Proprietors of K. P. v. Springer, 4 Mass.
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VII.

A GRANT WILL BE PRESUMED TO QUIET TITLE, WHERE THE POSSESSION HAS BEEN LONG—ACCOMPANIED WITH SUCH ACTS OF OWNERSHIP AS IS USUALLY EXERCISED BY THE OWNERS OF LAND.

The Oregon and California Railroad Company has been in possession of the lands in dispute for more than forty years, and during all of this time has openly exercised such acts of ownership over them as is ordinarily exercised by owners of land. It has paid the taxes thereon for each and every year since March 28th, 1870, with the exception of one year, and has made such permanent improvements, as are usually made upon land of the same character, similarly situated. The acts of ownership have been open and notorious, and its ownership of said lands has been a matter of common knowledge in the community where situated. All of these facts have been fully established by evidence in the record and as has just been referred

to hereinbefore when discussing Appellant's rights, acquired by adverse possession.

During the forty years preceding the commencement of the action of ejectment by the defendant on the 11th day of March 1911, neither the defendant nor any one in privity in interest with her, have ever by any act or deed indicated that they claimed these lands or any part thereof. They have not paid the taxes thereon for a single year, since the 28th day of March 1870.

“The assessment of taxes on the property to those ancestors, and their payment of the taxes for twenty years between 1770 and 1805, and of the assessment of taxes to them or to the defendants for seventy-seven years after 1805, and the payment of the taxes by them, such assessment being required to be made, under the laws of the state, to occupants or owners of the land, are circumstances of great significance, taken in connection with their constantly asserted ownership. In *Ewing v. Burnet*, 11 Peters (U. S.) 41, this court speaks of the uninterrupted payment of taxes on a lot for twenty-four consecutive years, as “Powerful evidence of claim of right to the whole lot.”

Fletcher v. Fuller, 120 U. S. 553.

The law as to when a grant will be presumed is clearly and fairly stated in the case of *Fletcher vs. Fuller* just cited. The following excerpts from the opinion of the court will show the application of the

law as therein stated to the facts in the cause at bar:

Quoting from page 547—

As said by this court in *Ricard v. Williams*, 7 Wheat. 59, 119, speaking by Mr. Justice Story: “A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.”

In the present case—the payment of taxes for more than forty years—in connection with the acts of dominion and ownership as openly exercised by complainant and its predecessors, are circumstances which go far in establishing a grant.

From page 549:

“In *Williams v. Donell*, 2 Head. 659, 697, which was also an action of ejectment, the Supreme Court of Tennessee, speaking on the same point, said: ‘It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility,

a grant might have issued. And this appearing, it may be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.' ”

In the case at bar, there are many facts and circumstances presented from which in the absence of any other evidence as to complainant's title it could be safely presumed, that the possession and claim of ownership of complainant was based upon a proper conveyance—

From page 551:

“The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect.”

It is only fair that the presumption should be indulged in in the present cause, for the reason that it has been clearly established by the evidence—that the complainant's title is based upon a writing, the original of which cannot be found.

Upon reason, the foregoing rule should be more liberally enforced, when a state of facts are presented, as in the case now before the Court.

And—further—from page 552:

“The presumption may, therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which under proper instructions, may be left to the jury.”

Nowhere does it appear in the transcript of record, by any evidence of any kind or character, that the complainant's possession has been interrupted to any extent whatsoever; nor is there any evidence that its claim of ownership has ever been disputed prior to the commencement of the said action in ejectment on the 11th day of March, 1911.

“The presumption in such cases arises not merely from the possibilities of the loss of documents by the common accidents of time, but from the general experience of men that

property is not usually suffered to remain for long periods in the quiet possession of any one but the true owner, and that no other person will deliberately add to the value of the property by permanent improvements.”

Oaksmith v. Johnston, 92 U. S. 343-345

A grant may be presumed, in a proper case, in order to quiet a title and to give to a long continued possession the quality of a rightful possession.

Chavez v. United States, 175 U. S. 552-563

Crespin v. United States, 168 U. S. 208

Hayes v. United States, 170 U. S. 637-649

Ricard v. Williams, 7 Wheaton U. S. 59

United States v. Pendell, 185 U. S. 189-199

Encyclopedia of United States Court Reports, Vol. 7, page 974.

The foregoing authorities, clearly show that the principle contended for by complainant, and as announced therein are fully established, and that they rest upon a sound basis. Justice demands that these principles be applied to the present controversy.

DEFENDANT'S CLAIM IS STALE, AND IS BARRED BY THE DOCTRINE OF LACHES.

The court will be asked to consider in connection with the evidence in the record as to complainant's acts of adverse possession, and as just above referred to, the fact that the defendant has made no showing that she or any other person claiming

under or by virtue of the residuary clause in the will of Ben Holladay, has asserted title to these lands prior to the bringing of the action in ejectment on the 11th day of March, 1911. It is necessary that some showing be made that defendant has been diligent in asserting any claim to these lands. The bringing of the action in ejectment twenty-five years after the estate of Ben Holladay has been fully settled, is not a sufficient showing.

At this point the court's attention should be called to a circumstance which no doubt has already been considered. The defendant's action in ejectment follows very closely after the discharge of Mr. Henry Conlin, who was in 1908 Acting Land Agent for the Oregon & California Railroad Company. A reading of his testimony as appears on pages 909 to 916 of the transcript, Vol. II, shows that he no doubt secured certain information while in the employ of complainant, which probably prompted him to seek out the defendant and get her sanction to the commencement of the action in ejectment on March 11, 1911. The defendant resides and then resided at Tunis, Tripoli. That Henry Conlin had more to do with the commencement of this action than any other person, is a conclusion which harmonizes with the fact that the heirs of Ben Holladay have not made any claim to these lands since the estate of Ben Holladay was administered and settled. Ben Holladay never made any claim to these lands after March 28th, 1870, and now forty-one years thereafter we find

an alive granddaughter, assisting an action at law, prosecuted by a former officer and employe of the real owner.

Equity only lends its aid to the diligent, and is reluctant to entertain the claim of persons who have slept on their rights. Equity does not favor any one, who seeks by technical rules, after the death of all who knew the facts, to recover property, the party never owned or claimed.

“There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases the courts often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights.”

Goddon v. Kimmel, 99 U. S. 201-210-225

Abraham v. Ordway, 158 U. S. 416-422-429

Penn. Mut. Life Ins. Co. v. Austin, 168 U. S. 685

Ulman v. Clark et al, 75 Fed. 868

This doctrine should be invoked by the court, against the claim of defendant.

“The doctrine applies to suits relating to lands and to matters of account.”

Norris v. Haggin, 136 U. S. 386, 34 L. Ed. 424

“A court of equity always refuses its aid to stale and antiquated demands, where no excuse is shown for not before asserting them.”

Lane etc. Co. v. Locke, 150 U. S. 193, 37 L. Ed. 1049

Thorn Wire Hedge Co. v. Washburn, etc. Mfg. Co., 159 U. S. 423, 444, L. Ed. 205

The court is here reminded that there is no evidence in the record that the defendant did not have knowledge of the fact that the Oregon & California Railroad Co. was in possession of these lands, and that it was claiming title thereto, and that no reason has been stated why the defendant has not commenced her action in ejectment before.

“A suitor in equity is required to be ‘prompt, eager, and ready,’ in the pursuit of his rights. Diligence is an essential condition of equitable relief, and laches and negligence are always discountenanced.”

Eiffert et al. v. Craps et al., 58 Fed. Rep. 470

“One who relies for the recovery of lands on a fraud 40 years old must be held guilty of laches, when it appears that the fraud might have been discovered at any time after its perpetration by the inspection of a single deed, recorded where the record of title of the land was to be looked for, and that the original purchaser under the deed has been dead 12 years, and the land devised by his will sold in partition, and resold several times.”

Underwood v. Dugan, 139 U. S. Rep. 380

“K, an heir at law of one N, more than 23 years after the death of N, and the probate of his will, filed a bill against N’s executors and trustees, alleging that under the will such executors and trustees had no exclusive property in or control over certain assets of the testator, and seeking distribution thereof as an intestate estate. The bill gave no reason for the delay, and charged no imposition or fraud. Held, on demurrer, that the suit was barred by plaintiff’s laches.”

Fuller et al. v. Montague et al., 59 Fed. Rep.

212

The court’s attention is called to the fact that defendant could have discovered by an examination of the records of Clackamas County, that (adopting argument of counsel for the defense, that title to these lands did not pass by the agreement signed by Ben Holladay & Co. of date March 28, 1870) record title was still in Ben Holladay & Co., and, as counsel for defendant has tried to show by numerous authorities cited, that it was technically in the name of Ben Holladay by reason of his being the only member of such co-partnership whose name appeared in the firm name. Here again we find a total lack of evidence. This would have been the least that could have been expected of defendant or anyone claiming under the residuary clause of the will of Ben Holladay.

“The purchaser of land at an administrator’s sale held notorious and exclusive possession of it nineteen years, and fifteen years af-

ter the youngest heir became of age. The heirs lived in the same neighborhood, knew their father had owned the land, and visited the purchaser's family, and were notified of the administrator's sale. The purchaser cut the timber, erected costly buildings, and contributed a large sum towards bringing an electric railway from the city to the premises, and the land rapidly increased in value. The deeds showing the transactions were of record. Held, that the heirs were guilty of laches preventing their recovery of the land, notwithstanding no notice of the appointment of the administrator was served upon them."

Loomis v. Rosenthal, 34 Or. 585

"A delay of 20 years by a daughter after her majority to assert any claim as heir to certain city lots for which her father held certificates from a townsite company, and which were conveyed to his administrator after his death, was laches, as against persons claiming under mesne conveyances from purchasers at a void administrator's sale; there being no fraud, and she having knowledge of facts sufficient to put her on inquiry leading to a knowledge of the facts which were spread upon the records of the probate court and the register of deeds, and the lots having by the growth of the city and by improvements, increased in value from \$250 to \$25,000.

"Counsel for the appellant invoke the principle that there can be no acquiescence and no laches where there is no knowledge, and contend that since the appellant did not know that she had any interest in these lots until 1891,

she cannot be charged with laches in asserting her rights. But ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to ascertain a fact, he shall be deemed conversant with it.' "

Wood v. Carpenter, 101 U. S. 135, 141

Metropolitan Bank v. St. Louis Dispatch Co.,
149 U. S. 436, 451, 13 Sup. Ct. 944
145 U. S. 317

The above is very much in point upon the questions before the court.

It has been urged by counsel for the defendant that instead of the defendant being barred by laches that it is the complainant who is presenting to the court a stale and antiquated claim, and that it should not for such reason prevail in this suit. In view of the fact that it has been shown hereinbefore that in equity the complainant acquired these lands on March 28, 1870, defendant's position cannot be sustained.

"Laches cannot be imputed to one in the peaceable possession of land under an equit-

able title, for delay in resorting to a court of equity for protection against the legal title; since possession is notice of his equitable rights and he need assert them only when he finds occasion to do so."

Massenburg et al. v. Denison et al., 71 Fed. Rep 619

Ruckman v. Gory, 129 U. S. Rep. 387

"Where a party is in possession of land, he may wait until his title and possession are attacked before setting up equitable demands without being chargeable with laches."

"Laches which will bar a suit in equity depends on the peculiar circumstances of each case, and where the complainant's inaction does not appear to have worked injury to anyone, and it is not shown that there was any occasion for more promptly asserting his rights, the defense will not prevail."

Hanchett v. Blair, 100 Fed. Rep. 817

When an owner stands by and sees a third person sell property as his own, without asserting his own title or giving the purchaser any notice of it, he is estopped as against such purchaser from asserting it afterwards.

Vilas v. Mason, 25 Wis. 310

Guffey v. O'Reiley, 88 Mo. 418

Markham v. O'Connor, 52 Ga. 183

Steel v. Smelting Co. 106 U. S. 456

It cannot be denied that it was negligence upon the part of Ben Holladay to have acquiesced in the transfer of all of the real property owned by the

Oregon Central Railroad Company on the 28th day of March, 1870 in the State of Oregon, to the Oregon & California Railroad Company, in view of the fact that as has been shown—see pages 47 to 62—*supra*—that he had himself as a member of the firm of Ben Holladay & Co., a co-partnership and as an individual, on the same day signed an agreement in which he agreed to convey unto the Oregon Central Railroad Company all of the real estate then owned by him in the State of Oregon, especially in Multnomah and Clackamas Counties. That he had knowledge of and acquiesced in such conveyance—see top of page 1487 of transcript, Vol. III.

IX.

WAS THE PURCHASE OF LAND BY OREGON CENTRAL RAILROAD COMPANY, AN ULTRA VIRES ACT?

Counsel for defendant claim that the acquiring of real property by the Oregon Central was ultra vires and that a court of equity will not specifically enforce the contract of March, 28, 1870 signed by Ben Holladay and Ben Holladay & Company.

It has been clearly established hereinbefore that it was the intention of Ben Holladay and Ben Holladay & Company when signing this agreement of March 28, 1870, to convey or at least to agree to convey unto the Oregon Central the lands in dispute. (See pages 62 to 83 *supra*)

Complainant has clearly identified the lands described as being the lands Ben Holladay and Ben Holladay & Company intended to convey or agree to convey unto the Oregon Central when signing such agreement. (see pages 62 to 70 supra.)

Complainant has also shown that the said lands were purchased for the use and benefit of Ben Holladay & Co. for use in construction of the Oregon Central and that they were so used in connection with the building of the first 20 miles of railroad for said Company. (see pages 31 to 43 supra.)

It has also been shown that the Oregon & California Railroad Company has acted and relied upon this agreement of March 28, 1870, for more than forty years and for more than thirty-nine years has paid the taxes on the lands in dispute, in reliance upon such agreement and its deed of March 29th, 1870, and that during the same period of time no one claiming under or by virtue of the residuary clause of Ben Holladay's will has ever denied the complainant's rights to these lands, paid a dollar of taxes thereon, had any possession thereof, or made any claim of any kind thereto.

The powers granted unto the Oregon Central were, among other things, to construct a railroad, with all the necessary branches, etc.

See Exhibit 28, which is the charter of the Oregon Central Railroad Company. (See pages 1337 to 1340 incl.—Vol. II of transcript)

By the provisions of its charter, the Oregon Central was empowered to construct a railroad. By virtue of this general power it also was vested with an implied power to do all things necessary and convenient in the construction of the said railroad.

“Corporations have implied power to take real estate the same as individuals. By this it is meant that corporations have such power to the extent that is necessary to effectuate the purposes of their creation.”

Thompson on Corporations, Sec. 2381, Vol 3.

“Power to purchase, possess and dispose of such real and personal property as may be *necessary and convenient*, to carry into effect the object of the incorporation.” (This provision has never been amended or repealed and is still the law in Oregon—see Article 4 of Sec. 6686 L. O. L.)

Deady’s General Laws of Oregon, Sec. 5,
Art. 4, p. 525.

It is not necessary that a showing be made that the Oregon Central could have constructed its railroad without the above described lands.

“Under this rule the real estate need not be necessary in the sense of being indispensable, but if it is convenient and proper under all the circumstances it is sufficient.”

Richardson v. Massachusetts Charitable
Assn. 131 Mass. 174

“Land is said to be necessary when it is

obviously appropriate and convenient to carry into effect the franchise granted.”

State v. Hancock, 35 N. J. L. 537

“The grant of corporate franchises will not be extended beyond the letter and spirit of the charter, yet it is not to be so strictly construed as to defeat the object of the grant, besides the powers expressly granted such as are strictly incidental but necessary to the object of the grant, are implied.”

Camden & Emboy R. R. Co. v. Commissioners, 23 N. J. L. 510

The fact the the Oregon Central found that it would aid them in the construction of the railroad to acquire these lands or that its contractors found it necessary to do so (which, it has been made very clear, it did through Ben Holladay & Company) is not to be construed as an *ultra vires* act, simply because it appears that after the railroad was completed these lands were not necessary for operating purposes. Furthermore, these lands were taken over as a part of the settlement made between Ben Holladay & Co. and the Oregon and California Railroad Company.

“When, where a corporation acquired land for its legitimate purposes, and in good faith purchased more than it needed, this did not render the purchase of any excess void, but the corporation could afterwards sell the surplus.”

Lauder v. Peoria &c., 71 Ill. Ap. 475.

If the court concludes, which it no doubt will after an examination of the evidence which has been referred to hereinbefore repeatedly, that these lands were purchased by Ben Holladay & Company for use in the construction of the Oregon Central, then it could go further and conclude that while the deeds read from James Grindley and Gardner Elliott to Ben Holladay & Company, in reality the consideration was paid by the Oregon Central and for that reason, in equity at least, the title vested in the Oregon Central at the time the agreement of March 28th, 1870, was executed, and the settlement made with Ben Holladay & Co.

There is nothing in the argument that these lands are located at some distance from the Oregon Central railroad tracks. What right has counsel for the defendant to assume, that the complainant will never have use for these lands, simply because they are not a part of its right of way. There being no express prohibition in complainant's charter preventing its acquiring these lands in the manner and for the purposes as has hereinbefore been shown, by what rule of law is it to be deprived of them? The court certainly will not do so upon a mere statement of counsel for the defendant to the effect that they are not now necessary for operating purposes, or that they were not so necessary at the time they were acquired. But they were reasonably necessary for construction purposes when acquired by Ben Holladay & Co. and as

an incident to the settlement with that firm, could be conveyed to the Oregon Central Railroad Company.

In view of what has just been stated, defendant cannot question the right of the complainant to hold title to these lands on the theory that it is an *ultra vires* act.

“Even as against an express constitutional or statutory prohibition, a corporation will hold a good title until it is invalidated in a direct proceeding by the state for such purpose.”

Louisville School Board vs. King, 32 Ky. L.
687

A great many authorities are cited by counsel for the defendant in an attempt to show that the Oregon Central could not, under its charter, have acquired the lands in dispute. None of these authorities, however, when carefully scrutinized, hold that where it appears that such lands were useful or convenient to the corporation in accomplishing the purposes for which it was created, that it is an *ultra vires* act.

The theory of the defendant seems to be that this Court cannot decree that the complainant is the owner of the lands in dispute for the reason that to do so would be using the powers of a court of equity to aid the complainant to violate the law by obtaining title to real property which it has no power to hold.

This doctrine has reference to a situation where an attempt is made to acquire lands that are not necessary or convenient to the carrying out of the purposes for which the corporation was created, as in the present case, to build a railroad.

In *Case vs. Kelly*, 133 U. S. 23, cited by counsel for defendant, an attempt was made by a corporation to compel certain persons (who had solicited donations of land, representing to the donors of said land that they were for the purpose of aiding the construction of a railroad) to convey such lands unto the corporation upon the theory that they were holding the lands in trust for the corporation. There was no showing in this case that the lands were actually used in any manner whatever in connection with the building of the railroad, or agreed to be conveyed in settlement of a construction contract as here nor was there any showing that the defendants had ever acknowledged by any writing, as was done in the case at bar, that the lands were to be the property of the company. A reading of this case discloses that it is not in point, and the same may be said of numerous other cases cited by counsel for defendant on this proposition. Time will not permit of any detailed discussion of the other authorities cited, and we do not believe it will be necessary.

X.

WAS THE OREGON CENTRAL LEGALLY ORGANIZED.

Counsel for defendant has raised every technical point possible in order to detract the Court's attention from the real merits herein, and has gone so far as to allege that the Oregon Central was not in law a corporation. See paragraph 5 of defendant's amended answer. Page 27 of transcript, Vol. I.

Where a private corporation has an existence in fact and is acting under color of law, its right to exist as a legal entity cannot be attacked collaterally by private parties, unless it is shown that such corporation has been declared to be an illegally organized corporate body in a direct proceeding instituted by the state for that very purpose.

Cook on Corporations, Sec. 637, 1804.

Central Ry. Co. v. Union Ry. Co. 144 Ala.
639

Leavenwood v. McGee, 50 Or. 233.

XI.

REFORMATION.

In this connection counsel for defendant proceeds upon the theory that complainant cannot prevail in this suit because it has failed to allege that there was a mutual mistake made in the preparation of this agreement of March 28, 1870, and that the agreement of the parties thereto was intended to

be different than as it was made; and further, that it failed to allege and prove that the mistake was not due to gross negligence on the part of the Oregon Central Railroad Co., complainant's grantor.

In Paragraph 7 of the bill of complaint (See page 5 of transcript, Vol. I) it is alleged very particularly that the lands in dispute were purchased by Ben Holladay & Co. to enable them to carry out their contract for the construction of the Oregon Central railroad; that these lands were purchased for the purpose of acquiring mill sites, and for the timber thereon, for ties and bridge timbers.

In Paragraph 8, (page 7 of transcript, Vol. I) immediately following, it is alleged that on the 28th day of March, 1870, a general settlement was had between Ben Holladay & Co. and the Oregon Central Railroad Co. of and concerning the performance of said contracts, (having reference to the contracts made by A. J. Cook & Co., which were acquired later by Ben Holladay & Co., all of said contracts being set out, and their connection with the agreement of March 28, 1870, explained in Paragraph 6 of complaint (pages 4 and 5 of transcript, Vol. I) and that an agreement was entered into, constituting a general settlement, which is set out in full and made a part of said Paragraph 8 of complainant's bill of complaint (page 7 of transcript, Vol. I). An analysis of the provisions of this agreement discloses that it was the intention

of the parties to reimburse Ben Holladay and Ben Holladay & Co. for all sums of money paid out in the construction of the railroad. See the following provisions of this agreement:

“In consideration of the cancellation this date by the Oregon Central Railroad Co. of all certain contracts in writing heretofore existing between said company and the undersigned in relation to the construction of a railroad, and the agreement of such company to pay the undersigned for all moneys paid out, it being a part of the arrangement that all the property hereinafter specified should be transferred and delivered to said company, and all leases and all property of every name and nature now owned by us in the possession of Ben Holladay & Co. in the State of Oregon, principally in Multnomah and Clackamas Counties, now and heretofore used by us in the construction of the railroad. It being the intention of this conveyance to transfer to the said Oregon Central Railroad Co. all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon.”

It is made clear by the above provision that the purpose of this agreement was to pay Ben Holladay and Ben Holladay & Co. all sums of money which they had paid out in constructing the Oregon Central railroad.

These provisions were evidently construed by counsel for defendant to mean that the Oregon

Central Railroad Co. was simply to pay Ben Holladay & Co. the sums paid out, and that Ben Holladay & Co. was to keep the property purchased in connection with the building of said road. In other words, it would seem to be the theory of counsel for defendant that Ben Holladay and Ben Holladay & Co. were to be paid from \$800,000 to \$1,000,000 simply for the labor performed in and about the construction of said road, and for their personal services. Such a theory cannot be placed upon any sound reasoning, even though it were not clearly negatived by the contract itself. It is stated very plainly in this contract that it was a part of the arrangement to transfer, convey, and deliver up all property, both real and personal, of every name and nature, then owned by the undersigned in the State of Oregon. This agreement being set out in a bill of complaint becomes a part thereof, and contains allegations of fact to be proven.

The only uncertain provision of this agreement (which however has been removed by the evidence referred to hereinbefore) is that it does not specifically describe the real estate to be conveyed, but in general terms conveys or agrees to convey all of the real estate "owned by the undersigned" in the State of Oregon at that time.

A writing agreeing to convey all of the real property of a grantor in the State of Oregon, especially in Multnomah and Clackamas Counties,

is not void as being too indefinite and uncertain in its description of the property, to be enforced, but will pass title to all of the real property of the grantor within said counties and state.

Wilson v. Boyce, 92 U. S. 325

Jones, Law of Real Property, Vol. I, Sec.
347

Tiffany, Law of Real Property, Vol. I, Sec.
387

Complainant has clearly proven that the lands in dispute here were lands owned by Ben Holladay and Ben Holladay & Co. on the 28th day of March, 1870, and that they were a part of the property purchased by Ben Holladay & Co. in connection with the building of the Oregon Central railroad.

Complainant in its prayer asks that a decree be entered adjudging and decreeing that complainant is the owner in fee simple of the said real premises, and of the whole thereof, and that the defendant is not the owner thereof, or any part thereof, and is not entitled to the possession thereof, or any part thereof. It also has asked that the agreement of March 28, 1870, be reformed and specifically enforced.

The position of counsel for defendant no doubt is that the complainant is precluded from having the decree that the lands in dispute are the property of complainant, because it has asked that the court also decree that the contract be reformed and specifically enforced. Having shown, however,

that it is the owner of these lands by reason of this general settlement, as evidenced by the agreement of March 28, 1870, in a suit to quiet title, complainant is entitled to a decree requiring that the defendant execute a formal deed to these lands, embodying therein the legal description. When complainant asks that this agreement be reformed, it was not basing its right to such relief upon any mistake in the sense contemplated by the defendant. Therefore the numerous authorities cited by defendant relative to the doctrine of reformation do not apply. The instrument should be reformed, so as to make the description specific and as so reformed, the same should be specifically enforced, as a contract to convey.

Is the agreement of March 28, 1870 a sufficient writing in equity to convey title to real property, or to entitle the vendee to enforce the same in equity?

“Contracts may be enforced, where, from some default, or some lack of legal formality or condition no action at law can be maintained. There are two general classes of such cases. * * * The second class embraces contracts which are not valid in law, which the law does not treat as contracts at all, but which equity regards as binding in conscience, and enforces by its remedy of specific performance. The legal invalidity may result from the non-observance of some statutory requirements concerning the mode of making the agreement, or from certain doctrines of

the common law, irrespective of statute, affecting its terms or its subject-matter.

Pomeroy's Equity Jurisprudence, Vol. 3,
Sec. 1297

An unacknowledged deed although not entitled to record, passes title, and is a good conveyance except as to a bona fide purchaser for value, and is good between the parties.

Manadas v. Mann, 14 Or. 450

Security Trust Co. v. Lowenberg, 38 Or. 163

Eadie v. Chambers, 172 Fed. 75

A contract containing the essential terms of sale, although not complete, is sufficient within the statute of frauds.

Stubblefield v. Embler, 33 Or. 450

Salmon Falls Mfg. Co. v. Goddard, 14 How.
446

After establishing the existence of the agreement of March 28, 1870, and having identified the lands in dispute as being the lands to be conveyed to the Oregon Central Railroad Co. by such agreement; and having shown that complainant has relied upon such agreement for more than thirty years, and holds a conveyance from the Oregon Central of date March 29th, 1870, and that the defendant claims to hold the legal title by reason of the residuary clause in the will of Ben Holladay, deceased, and that the agreement of March 28, 1870, which may be specifically enforced as being fully performed on the part of complainant, complainant is entitled, under and

by virtue of Section 516 of Lord's Oregon Laws, to the relief prayed for in its bill of complaint.

SECTION 516:

"Any person claiming an interest or estate in real estate not in the actual possession of another, may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates."

"A suit to ascertain and quiet title under this section extends to and involves all grounds of controversy between the parties as to title to the premises, and with the final decree therein, all matters affecting such title are determined."

Starr v. Stark, 1 Sawyer, 270

"A suit to remove a cloud from title may be maintained, even if the instrument constituting the claim is void on its face."

Mount v. McAuley, 47 Or. 45

This section authorizes the maintenance of a suit whether plaintiff's title is deemed legal or equitable, to determine an adverse claim.

Kollock v. Bennett, 53 Or. 395

Complainant is clearly entitled to a decree requiring the defendant to execute a good and sufficient deed to the lands in dispute, as prayed for in its bill of complaint.

CONCLUSIONS.

It has been the purpose of complainant to direct the Court's attention to certain matters of evidence herein which it believes conclusively establishes:—

FIRST: That on the 28th day of March, A. D. 1870, an agreement was executed by the firm of Ben Holladay & Company and Ben Holladay agreeing to convey unto the Oregon Central the lands described.

SECOND: That it was the intention of Ben Holladay and Co. and Ben Holladay and others when affixing their signatures to this agreement, to include these lands within its terms, and to make it clear that such was their intention complainant has shown:

(a) that the lands were purchased for the use and benefit of Ben Holladay & Co. in the construction of the Oregon Central Railroad and that they would not have been purchased at the time they were, by Ben Holladay or by Ben Holladay & Company had it not been necessary for them to have secured the lands for saw mill sites and timbers for ties and bridges, for use in the construction of said railroad:

(b) that saw mills were built upon the said lands by Ben Holladay & Company and that all of the timber thereon was manufactured into ties and bridge timbers for use in building the first 20 miles of railroad of the Oregon Central Railroad Company;

(c) that the writing itself when considered

in connection with the other writings appearing upon pages 160 to 208 of Exhibit 7, (pages 380 to 440 of transcript, Vol. I), and with the depositions and affidavit of Ben Holladay in the dissolution suit, clearly identifies these lands in dispute with the contract and shows beyond a reasonable doubt that they were purchased for the use and benefit of Ben Holladay & Co. for use in the construction of the Oregon Central railroad, and that they were paid for by the said Company in the final settlement made March 28th, 1870, with Ben Holladay & Co.

THIRD: That complainant went into possession of the lands on the 29th day of March, 1870, by virtue of a deed of conveyance from the Oregon Central Railroad Company and relying upon the said agreement of March 28th, 1870, and deed of March 29th, 1870, and in further reliance upon said agreement and deed has paid the taxes thereon for more than thirty years, aggregating \$1773.79, and has made permanent improvements thereon of the value of \$500.00, all relying upon the said agreement of March 28th, 1870, and the deed of March 29th, 1870, under color and claim of title and that its possession has been open, notorious, continuous and adverse ever since March 29th, 1870.

Counsel for the defendant have not presented one single item of evidence in the case aside from the testimony of Orrin E. Battin in connection with the complainant's claim of adverse possession. They have discussed at great length many academic prin-

ciples of law relative to the exclusion of certain classes of evidence, in an attempt to keep from the records certain matters which are so convincing as to leave no doubt whatsoever as to the existence, execution and delivery of this agreement of March 28, 1870, and that it was the intention of Ben Holladay and Ben Holladay & Company when executing said agreement to convey or agree to convey unto the Oregon Central the lands in dispute.

Complainant submits that it has clearly shown by the matters and things hereinbefore set forth that it is entitled to the relief as prayed for in its bill of complaint, that the decree of the court below should be reversed and a decree entered in this court in accordance with the prayer of the bill and for costs and disbursements.

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